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ARTICLE

TRAVELERS, REASONED TEXTUALISM, AND THE NEW JURISPRUDENCE OF ERISA PREEMPTION

Edward A. Zelinsky*

INTRODUCTION

Upon the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"),¹ few would have predicted that, a generation later, ERISA's provisions preempting state law would be front page news,² a central topic of national debate about health care and its regulation. Similarly, few foresaw at the time ERISA was adopted that the United States Supreme Court would have great difficulty construing ERISA's preemption provisions. By the same token, in 1974 the contemporary revival of interest in statutory textualism lay well into the future.

In 1999, in contrast, the relationship among HMOs, state law, and ERISA preemption is a major (and controversial) concern in efforts to craft national health care legislation; indeed, the 106th Congress has devoted considerable attention to the states' legal ability *vel non* to regulate managed care providers and to provide tort remedies against them. The Supreme Court, in three recent decisions, has, without acknowledging it, largely abandoned its prior approach to ERISA section 514, the provision of ERISA which explicitly preempts state law. Many commentators suggest

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¹ Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1994)).

² See Lizette Alvarez, *Eye on Polling, G.O.P. Unveils a Patients' Bill*, N.Y. TIMES, July 16, 1998, at A1; Robert Pear, *Hands Tied, Judges Rue Law That Limits H.M.O. Liability*, N.Y. TIMES, July 11, 1998, at A1; Robert Pear, *H.M.O. Group Backs Controls G.O.P. Rejects*, N.Y. TIMES, July 14, 1998, at A1; Robin Toner, *Fevered Issue, Second Opinion*, N.Y. TIMES, Oct. 10, 1999, § 4, at 1; see also, Jonathan Cohn, *Cosmetic Surgery*, NEW REPUBLIC, Aug. 17/Aug. 24, 1998, at 25 (cover story); Michael M. Weinstein, *Getting Litigious With H.M.O.'s*, N.Y. TIMES, July 19, 1998, § 4, at 5.

that the failure of the Court's jurisprudence of ERISA preemption is a case of textualism gone awry,³ most welcome the Court's recent decisions as an appropriate, indeed overdue, revision of the Court's approach to section 514.

Central to these controversies is the Court's decision in *Shaw v. Delta Air Lines, Inc.*,⁴ in which the Court announced a capacious understanding of ERISA preemption, an understanding which makes preemption of state law nearly automatic in the context of employer pension and welfare plans. The critics have not been kind to *Shaw*, suggesting that it constitutes an exemplar of overly mechanistic, dictionary-based textualism. The Court's new jurisprudence of ERISA preemption, announced in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,⁵ places the Court, implicitly and in part, with the critics of *Shaw*.

I depart from the conventional critique of *Shaw* and of the Court's original formulation of ERISA preemption insofar as that critique suggests that the Court should formulate its ERISA preemption case law with little (perhaps no) regard for the terms of the statute. To the contrary, I argue that ERISA preemption be approached from a vantage which can best be labeled "reasoned textualism." This approach is "textualist" because it emphasizes the statute as the primary source of law and defines its task as making the statute as workable as possible.⁶ This approach is "reasoned" as it eschews a mechanical, dictionary-based textualism (properly disparaged by the critics of *Shaw*) and instead

³ See, e.g., Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 324 (1998) (criticizing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), as an "easy, dictionary-driven, plain meaning disposition of the term . . . [which] produced a flood of litigation for the lower federal courts"); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 39 (1996) ("If ever there were a case study of the failures of textualism as a method of statutory interpretation, this is it."); Peter D. Jacobson & Scott D. Pomfret, *Form, Function, and Managed Care Torts: Achieving Fairness and Equity in ERISA Jurisprudence*, 35 HOUS. L. REV. 985, 990 (1998) (criticizing the Supreme Court for "a mechanical approach [to ERISA preemption] that adheres to a strict 'plain language' interpretation without questioning whether the result of these interpretations can be reconciled with congressional intent").

⁴ 463 U.S. 85 (1983).

⁵ 514 U.S. 645 (1995).

⁶ This textualist vantage differs both from policy-driven approaches, under which the courts fashion doctrine to achieve desired outcomes with minimal (if any) regard for the statutory terminology, and intent-based methodologies, which purport to discern the subjective intent of those who enacted ERISA. In the context of ERISA preemption, these two alternatives have more in common than first appears; and, in practice, may amount to the same methodology, given the difficulty of finding intent in a statute like ERISA, a complex jumble of compromises and policies. See *infra* notes 201-07 and accompanying text.

views statutory interpretation as a constrained process of judgment and reflection. The underlying premise of such reasoned textualism is that, in an area like the federal regulation of employee benefit plans, an area of many and imperfect policy judgments, Congress is the principal policymaker, a policymaker which, however imprecisely and inelegantly, speaks through statutes.

Approaching ERISA preemption through the motif of reasoned textualism, the most compelling understanding of ERISA section 514 is that it commands greater than usual preemption scrutiny but that, by itself, section 514 does not answer the preemption inquiry. Section 514 should thus not be read as the typical express preemption clause, but should be understood as a canon of construction which creates a presumption for preemption in contrast to the normal predisposition against preemption; consequently, section 514 is not to be read alone but must be viewed in the context of the rest of ERISA.

On the subjects where ERISA affirmatively legislates, e.g., the administration of employee benefit plans, the fiduciary standards governing such plans, the substantive rules for pension plans, this approach raises the normal questions for implied preemption—Is there conflict between state law and ERISA? Does ERISA fully occupy the field to the exclusion of state law?—but reads section 514(a) as establishing a rebuttable presumption for preemption.

On the employee benefit subjects where ERISA does not legislate, i.e., as to the content of welfare plans, this approach construes section 514(a) as establishing a zone of employer autonomy, free of state and federal regulation. This zone is defined by analogizing from the topics which ERISA legislates as to pensions but not welfare arrangements.

The reasoned textualist approach requires judicial judgments, some close and difficult; nevertheless, under this approach the statute shapes the inquiry and molds the outcomes since a predisposition to find preemption (while less expansive than the capacious test of the *Shaw*-based case law) defines the import of the statute more broadly, leading to more conflict between state and federal law, greater field occupation, and, ultimately, more preemption than under normal preemption standards. This reasoned textualist approach suggests skepticism of *Travelers* since a searching reading of section 514 indicates that (contra *Travelers*) that section is more than a codification of the Court's normal implied preemption standards. On the other hand, my approach suggests a narrower range of ERISA preemption than does *Shaw*

and, in particular, suggests that, under ERISA as it now exists, states can regulate HMOs and similar managed care providers and furnish tort remedies against them even when such providers are engaged by ERISA plans.

I advance my analysis in five steps. Part I of this Article reviews the explicit statutory basis for ERISA preemption, section 514, and discusses the three stage inquiry mandated by that section. Part II then explores the Court's initial case law based upon the capacious interpretation of section 514(a) announced in *Shaw* and follows that case law chronologically through the end of the *Shaw* line, *District of Columbia v. Greater Washington Board of Trade*.⁷ Part III of this Article discusses the Court's new jurisprudence of ERISA preemption announced in *Travelers*.⁸ While the Court has so far declined to acknowledge the extent to which *Travelers* departs from the *Shaw* framework, *Travelers* replaces the expansive *Shaw* approach of near automatic preemption with the Court's traditional presumption against the displacement of state law, while simultaneously subjecting certain areas, previously litigated under the *Shaw* framework, to more stringent (though undefined) preemption. This third section argues that *Travelers*, while implicitly acknowledging the problems of the *Shaw* approach, is itself flawed. The *Travelers* framework gives inadequate substance to the terminology of section 514 which commands something more than the Court's normal preemption doctrine with its predisposition against preemption; moreover, the *Travelers* formula is an ambiguous and unconvincing method of preserving prior case law while simultaneously repudiating the *Shaw* approach on which that case law is based.

Part IV of this Article outlines the reasoned textualist approach and applies it to the *Shaw* and *Travelers* case law; in many cases, the reasoned textualist approach preserves the *Shaw*-based case law better than does *Travelers*; indeed, this approach provides a more convincing explanation for the results in *Travelers* than does *Travelers* itself; when the reasoned textualist vantage produces different results than *Shaw*, that difference is for the better.

In particular, Part IV addresses the questions which have recently occupied the attention of the courts, commentators, and Congress: Does ERISA section 514 preempt state law tort actions for medical malpractice and similar injury? Can the states, consistent with ERISA, regulate HMOs and similar health care providers? I conclude that section 514 does not preempt state law

⁷ 506 U.S. 125 (1992).

⁸ 514 U.S. 645 (1995).

tort actions against service providers hired by employer-sponsored plans though it does preempt when the plan itself furnishes services. I similarly conclude that the states can, consistent with ERISA, regulate HMOs and other health care providers even when they furnish services to employer plans. These conclusions emerge from a more searching analysis of the relevant statutory text, suggesting that the problem to date has not been a surfeit of textualism in the context of ERISA preemption, but an incomplete engagement with the statute.

Moreover, this analysis suggests that the proposed Dingell-Norwood modifications to section 514, passed by the House of Representatives⁹ and intended to narrow the scope of ERISA preemption vis-à-vis HMOs and other managed care providers, may, in the context of the reasoned textualist approach, be superfluous. Indeed, in some instances, Dingell-Norwood's preemption provisions, if enacted into law, would paradoxically reduce the tort liabilities of HMOs and other managed care entities in comparison with their liabilities under the reasoned textualist interpretation of section 514.

Part V places my analysis in several contexts. Among my other assessments, I conclude that, while a reasoned textualist approach can make section 514 more workable, Congress should, as a matter of policy, repeal section 514, thus permitting ERISA preemption to be governed by the Court's normal standards of implied preemption.

I. THE STATUTE

As has been widely noted,¹⁰ ERISA governs two types of employer-provided fringe benefit plans, but treats them dissimilarly. ERISA covers both employer-provided deferred compensation arrangements, denoted in the statute as pension plans,¹¹ and employer-provided health, disability, and similar

⁹ The Dingell-Norwood legislation, entitled the "Bipartisan Consensus Managed Care Improvement Act of 1999," constitutes sections 1001-1601 of House Bill 2990, passed by the House in the first session of the 106th Congress. See H.R. 2990, 106th Cong. § 1302 (1999) (modifying ERISA preemption).

¹⁰ See, e.g., JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 79 (2d ed. 1995).

¹¹ See ERISA § 3(2)(A), 88 Stat. 829, 833 (1974). ERISA consists of two types of provisions, tax provisions governing qualified plans as part of the Internal Revenue Code and labor provisions codified as part of the federal labor statutes. Sometimes, these provisions overlap, indeed, are identical. In this Article, I follow convention by referencing ERISA's labor sections to their original (uncodified) designation in ERISA itself while referencing ERISA's tax provisions to their current Internal Revenue Code designations.

programs, denoted as welfare plans.¹² In some areas, ERISA subjects both kinds of plans to the same statutory provisions. In particular, ERISA mandates for both pension and welfare plans the same obligations to report to the government and to plan participants,¹³ identical fiduciary responsibilities for those managing plans and plan assets,¹⁴ and the same judicial and administrative remedies for such plans and those interested in them.¹⁵ However, ERISA subjects pension arrangements, but not welfare plans, to elaborate statutory provisions governing the substantive content of such deferred compensation schemes.¹⁶ These rules govern, inter alia, who must participate in pension plans and when, the rates at which benefits and contributions must accrue and vest, the nondiscriminatory nature of benefits and contributions, and a variety of features about plan distributions. In contrast, ERISA does not regulate the substance of welfare plans. Viewed more affirmatively,¹⁷ ERISA provides, as to the substance of welfare arrangements, for employer autonomy.¹⁸

At the end of the legislative process finalizing the bills which became ERISA, the Conference Committee added section 514 which provides that, as to pension and welfare plans covered by ERISA,¹⁹ ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any" such plans.²⁰ Excepted from this preemptive rule are state insurance, banking, and securities laws,²¹ as well as states' "generally applicable criminal law[s]."²² However, the states may not deem ERISA-covered plans to be insurance companies, subject to state insurance

¹² See *id.* § 3(1), at 833.

¹³ See *id.* §§ 101-111, at 840-52.

¹⁴ See *id.* §§ 401-414, at 874-90.

¹⁵ See *id.* §§ 501-515, at 891-97.

¹⁶ See *id.* §§ 201-308, at 852-74.

¹⁷ Most commentators criticize ERISA's failure to regulate the substance of welfare arrangements. See, e.g., Fisk, *supra* note 3, at 37 ("ERISA preemption has created an enormous, unanticipated 'regulatory vacuum.'"); Troy Paredes, Note, *Stop-Loss Insurance, State Regulation, and ERISA: Defining The Scope of Federal Preemption*, 34 HARV. J. ON LEGIS. 233, 243 (1997) (criticizing "ERISA's regulatory void with respect to welfare plans").

¹⁸ In the case of collectively-bargained welfare plans, ERISA's policy of non-regulation is more appropriately characterized as employer/union autonomy since the substance of such plans is determined through labor/management negotiations. The term "employer autonomy," as I use it throughout this Article, should be understood as including such employer/union autonomy.

¹⁹ Among the plans not subject to ERISA are most governmental and church plans. See ERISA § 4(b), 88 Stat. 829, 839-40 (1974).

²⁰ *Id.* § 514(a), at 897.

²¹ See *id.* § 514(b)(2)(A), at 897.

²² *Id.* § 514(b)(4), at 897.

regulation.²³

Thus, as a statutory matter, section 514 requires an analysis which can involve as many as three steps. In the face of the contention that ERISA preempts a state law, the first step under section 514 is to determine whether the particular state law "relate[s] to" ERISA plans;²⁴ if not, the ERISA preemption inquiry under section 514 ends and the state law survives scrutiny under section 514.²⁵ If, on the other hand, the state law in question "relate[s] to" ERISA arrangements, that law is preempted unless it falls within one of the four protected categories.²⁶ Thus, the second step under section 514 is to decide if the challenged state law, while relating to ERISA plans, is protected by one of these statutory categories; if the state law falls outside all of the protected categories, the statutory inquiry ends with the state law preempted per section 514; if, however, the state law falls within one of the protected categories other than insurance law, the section 514 inquiry ends with the law protected from section 514(a)'s mandate to preempt.²⁷ If the state law is shielded from ERISA preemption by virtue of the law's status as an insurance provision, the third and final step under section 514's "deemer clause" is to determine whether the statute affects only genuine insurance companies; if so, the state regulation survives ERISA preemption under section 514;²⁸ if, in contrast, the state insurance rule reaches ERISA plans only by deeming such plans to be insurance companies, the protection for state insurance laws evaporates and the state law is preempted under section 514.

While some have labeled section 514 an accommodation of fairly narrow interests,²⁹ a chief sponsor of ERISA, in language subsequently much-quoted,³⁰ hailed section 514 as ERISA's "crowning achievement,"³¹ freeing interstate employers from conflicting state regulation.

²³ See *id.* § 514(b)(2)(B), at 897.

²⁴ See *id.* (preempting state laws that "may now or hereafter relate to any employee benefit plan").

²⁵ However, a state law, while immune from preemption under section 514, might still be preempted under the Court's normal implied preemption doctrine. See *infra* notes 51-55 and accompanying text.

²⁶ The four protected categories are banking, securities, insurance, and general criminal laws. See *supra* notes 21-22 and accompanying text.

²⁷ Note, again, that the state law, while immune from preemption under section 514, might still be preempted under the Court's normal rules of implied preemption. See *infra* notes 51-55 and accompanying text.

²⁸ Again, the state law, while not stricken per section 514, may be preempted under the Court's normal preemption doctrine. See *infra* notes 51-55 and accompanying text.

²⁹ See LANGBEIN & WOLK, *supra* note 10, at 418-23.

³⁰ See, e.g., Paredes, *supra* note 17, at 272-73.

³¹ 120 CONG. REC. 29,197 (1974) (remarks of Rep. Dent).

One possible approach³² to section 514 is to understand it as codifying the Court's existing preemption doctrine. Ultimately, however, that characterization of section 514 is unconvincing. To those embracing traditional legislative history, the comments with which section 514 was unveiled to the House and Senate are strong evidence that those who crafted section 514 thought they were doing more than merely codifying the Court's preemption doctrine, doctrine which the Court would have applied even if there had been no section 514.

Even to those more skeptical of such history, it is hard, as a textual matter, to view section 514 as incorporating the Court's prevailing preemption standards when, without section 514, the Court would have applied those standards anyway. Moreover, if section 514(a) merely codifies the Court's normal preemption rules, it is difficult to explain the provisions of section 514 which exempt from ERISA preemption state insurance, banking, securities, and criminal laws. If section 514(a) merely embodies normal preemption standards, these exemptions are, from a textual perspective, most plausibly read as reducing the level of preemption in these earmarked areas below such normal standards. Ironically, under this reading, section 514 becomes an anti-preemption provision, its only practical effect to exempt state insurance, banking, securities, and criminal laws from normal preemption scrutiny.

Indeed, these exemptions represent a critical textual feature³³ of the statute, as section 514's protection for state banking, securities, insurance, and criminal laws indicates that there is something from which such laws are being protected. That, in turn, implies that section 514(a) must embody more than the Court's usual preemption standards. Thus, the more compelling construction of the text is that ERISA's drafters provided for greater than normal preemption in section 514(a), but protected the specified categories of state laws from this increased scrutiny, relegating them to normal preemption standards.

Finally, from a textual perspective, it is instructive to compare

³² Justices Scalia and Stevens have been most outspoken in urging this approach. The Court's new case law under *Travelers* largely, but incompletely, adopts this approach, embracing the normal presumption against preemption but nevertheless preserving prior case law inconsistent with that presumption. See *infra* notes 117-19 and accompanying text.

³³ As is discussed *infra* note 118 and accompanying text, another major textual feature of section 514 is that it provides a single standard for all non-exempted state laws, i.e., "any and all" such state laws are preempted. ERISA § 514(a), 88 Stat. 829, 897 (1974). Nevertheless, *Travelers* establishes a two-tiered scheme of preemption scrutiny, even though there is no basis for such a scheme in the statute.

the narrower preemption provisions in the bills passed by the House and Senate with section 514 as it emerged from the Conference Committee and ultimately became law.³⁴ Since these rejected texts come much closer to embodying normal preemption principles, it is hard to read the broader language of section 514(a) as doing the same.

II. SHAW AND ITS PROGENY: NEAR AUTOMATIC PREEMPTION

The Court's initial³⁵ approach to section 514(a) was formulated in *Shaw v. Delta Air Lines, Inc.*³⁶ In *Shaw*, New York law mandated pregnancy-based disability payments for employees when federal law did not.³⁷ In a statement which articulated the essence of the Court's original jurisprudence of ERISA preemption, the Court declared that it had:

[N]o difficulty in concluding that the [New York] Human Rights Law and Disability Benefits Law "relate to" employee benefit plans. The breadth of § 514(a)'s pre-emptive reach is apparent from that section's language. A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Employing this definition, the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly "relate to" benefit plans. We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some

³⁴ See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 n.19 (1982).

³⁵ Decisions prior to *Shaw* had mentioned section 514(a), and one of them, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), had reached the merits. However, *Alessi* avoided the more difficult issues lurking in section 514. In *Alessi*, injured employees challenged provisions in their employers' pension plans which integrated, i.e., reduced, pension benefits by the amount of workers' compensation payments received by these employees. A New Jersey statute explicitly outlawed this practice. The Court held the New Jersey law preempted under section 514 and thus sustained the integration formulas of the employers' plans and the consequent reduction of pension benefits to offset workers' compensation payments. See *id.* at 526.

Much of the *Alessi* Court's analysis is compatible with traditional preemption doctrine, although the Court did not characterize it as such. ERISA specifically permits the integration of pension benefits with social security payments; the Treasury regulations implementing ERISA extend the scope of permitted integration to reductions for other kinds of payments such as workers' compensation. Even without section 514, the Court could plausibly have viewed federal regulation as occupying the field and as conflicting so clearly with the New Jersey statute as to preempt it. Instead, the Court found the New Jersey statute "relate[d] to" ERISA-covered pension plans and therefore superseded. *Id.*

³⁶ 463 U.S. 85 (1983).

³⁷ See *id.* at 89.

more restrictive meaning.³⁸

In what became an equally important statement (albeit tucked away in a footnote), the Court indicated that, in particular settings, there would indeed be good reason for restricting the literal application of the "relate to" language: some state laws might "affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant" preemption.³⁹

In retrospect, the problems of the *Shaw* framework seem self-evident: on the one hand, the *Shaw* Court declared the "relate to" standard an easily applied and expansive term without discernible limits, i.e., if a state law "has a connection with" an ERISA-covered plan, section 514(a) applies. Under this understanding of the statute, ERISA preemption is nearly automatic whenever section 514 is invoked. On the other hand, the Court acknowledged that there must be some boundaries to the reach of ERISA preemption. Presumably, a plan trustee double parked for a meeting with his fellow trustees cannot defend against a traffic ticket on the ground that he was engaged in the business of an ERISA-regulated plan. Even acknowledging the inherent imprecision of inquiries of this sort, the *Shaw* approach to section 514(a) provides little (if any) useful guidance as to where ERISA preemption ends.

However, my instinct is to be more charitable in assessing retrospectively the handiwork of the *Shaw* Court; hindsight, as they say, is always 20/20. Moreover, in 1983 few could have prophesied the factors which would later make the *Shaw* test so unsatisfactory: the explosive growth of employer-provided medical outlays, the consequent rise of managed care, the determination of the states to regulate such care. In addition, the outcome in *Shaw* was reasonably benign; for years subsequent to those at issue in *Shaw*, federal law had outlawed pregnancy-based discrimination prospectively; thus, declaring New York law preempted in practical terms had only retroactive effect for prior years.⁴⁰

Finally, the *Shaw* Court may have been led astray by the usually helpful distinction between express and implied preemption.⁴¹ When a federal statute explicitly provides for preemption, that preemption provision is typically a reasonably self-contained expression of policy, minimizing, if not eliminating, the need for extensive analysis of the rest of the statute to see if

³⁸ *Id.* at 96-97 (footnotes omitted).

³⁹ *Id.* at 100 n.21.

⁴⁰ *See id.* at 89-90.

⁴¹ *See, e.g.,* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997).

the statute conflicts with state law or occupies the field to the exclusion of state law.⁴² In contrast, implicit preemption, by definition, depends upon such an analysis of the statute to discern conflict or preemptive occupation of the field. As I suggest below, the most workable reading of section 514 is as something of a hybrid, using elements of both approaches, placing section 514(a) alongside the relevant provisions of the statute and treating that section as a canon of construction which creates a presumption for preemption.

However, the *Shaw* Court plausibly, if ultimately mistakenly, approached section 514(a) as a typical explicit preemption provision, more or less capable of application independently from the rest of ERISA and the implied preemption inquiries of conflict and field preemption.

The Court's next ERISA preemption case, *Metropolitan Life Insurance Co. v. Massachusetts*,⁴³ reaffirmed the *Shaw* test which the Court used to conclude that a Massachusetts insurance law mandating mental health coverage in group insurance contracts relates to welfare plans for purposes of section 514(a). The Massachusetts statute, the Court decided, had "a connection with or reference to" employers' health plans, "indirectly but substantially," since the statute required such plans "to purchase the mental-health benefits specified in the statute when they purchase a certain kind of common insurance policy."⁴⁴ In the second step of its analysis, the Court found the Massachusetts law, while related to ERISA plans, nevertheless saved from preemption as an exempted insurance statute.

For purposes of the present discussion, two aspects of *Metropolitan Life* are noteworthy. First, only after determining that the Massachusetts statute relates to welfare plans for purposes of section 514(a) did the Court employ the normal presumption "that Congress did not intend to pre-empt areas of traditional state regulation."⁴⁵ Thus, the Court utilized the presumption against preemption not in applying section 514(a) and the relate-to standard, but only in the second stage of the section 514 inquiry, when the Court turned to the insurance exemption from ERISA preemption. This approach contrasts markedly with the Court's new jurisprudence of ERISA which deploys the presumption

⁴² Compare ERISA § 514(a), 88 Stat. 829, 897 (1974), with the explicit preemption provision of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). See USERRA § 4302, 108 Stat. 3150 (1994).

⁴³ 471 U.S. 724 (1985).

⁴⁴ *Id.* at 739 (citations omitted).

⁴⁵ *Id.* at 740.

against preemption at the first step of the analysis, i.e., when determining whether a state law relates to ERISA plans for purposes of section 514(a).

Second, the Court found that the Massachusetts statute related to employer health plans by "indirectly but substantially"⁴⁶ affecting employers' choices in the marketplace: under the Massachusetts statute, an employer is forced either to self-fund its employees' health benefits or to purchase insurance providing mandated mental health benefits; as a result of the state statute, the employer is deprived of the option of insuring health benefits for its employees *sans* mental health coverage. The Court's new jurisprudence, in contrast, dismisses such constrictions of employer choices as indirect and, as such, not triggering section 514(a).⁴⁷

Many have criticized *Metropolitan Life* for the dichotomy between insured plans (indirectly subject to state supervision via the states' regulation of insurance policies) and self-funded plans (free of state regulation by virtue of ERISA preemption).⁴⁸ However, the Court's response to this criticism was (and remains) sound: the distinction between insured and noninsured plans is not of the Court's making, but is in the statute, namely, section 514's exemption for state laws regulating insurance.

The more serious problem with *Metropolitan Life* is that it solidified the Court's commitment to the *Shaw* understanding of the relate-to test; because of section 514's exemption for state insurance laws, the Massachusetts statute (while relating to ERISA-covered plans) was ultimately saved from preemption since it is an insurance law.⁴⁹ It is, however, interesting to speculate whether, in the absence of the insurance exemption, the *Metropolitan Life* Court would have perceived the *Shaw* approach as going too far. Suppose, for example, that there were no insurance exception in section 514 and that the Court had in *Metropolitan Life* stricken the Massachusetts statute mandating mental health benefits as that law applied to ERISA plans. How far would the Court have been willing to apply this (hypothetical) *Metropolitan Life* opinion? If, for example, an ERISA-covered health plan of a Massachusetts employer desired to purchase insurance from a carrier unlicensed to do business in Massachusetts, would section 514 have preempted Massachusetts from forbidding a relationship between the unlicensed insurer and

⁴⁶ *Id.* at 739.

⁴⁷ See discussion of *Travelers* *infra* notes 105-15 and accompanying text.

⁴⁸ See, e.g., LANGBEIN & WOLK, *supra* note 10, at 444-45.

⁴⁹ Section 514's exception for state insurance laws raises its own interpretative issues. See *UNUM Life Ins. Co. v. Ward*, 119 S. Ct. 1380 (1999).

the ERISA plan? The only doctrinal tool in the *Shaw* toolkit to avoid this outcome would have been to characterize Massachusetts's prohibition on unlicensed insurers as "remote," "tenuous," or "peripheral" to ERISA plans,⁵⁰ not a terribly convincing notion when state law simply forbids a plan from contracting with a desired service provider because the provider is unlicensed.

Perhaps, confronted with these possibilities, the Court would have recoiled in *Metropolitan Life*, as it later did in *Travelers*, seeing that *Shaw*'s capacious approach of near automatic preemption could lead to undesirable places. However, section 514's exemption for state insurance laws precluded the Court from having to face these possibilities; the *Shaw* standard thus looked manageable since, in the final analysis, the Massachusetts statute was sustained.

In contrast, in *Pilot Life Insurance Co. v. Dedeaux*,⁵¹ the *Shaw* formula had a more pronounced impact, i.e., the denial to the aggrieved participant of his state law remedies. Moreover, *Dedeaux* was the first decision in which the Court found implied preemptive force in an ERISA provision other than section 514. Dedeaux was insured under an employer-provided group disability policy. After Dedeaux was injured, the carrier and Dedeaux disagreed about his eligibility for benefits. Dedeaux then sued the carrier pursuant to several tort theories available under Mississippi law.

Relying again on the *Shaw* formulation of the relate-to test, the Court found that Dedeaux's state law tort claims had "a connection with or reference to" his employer's ERISA-covered plan providing disability benefits on an insured basis.⁵² Since these claims did not constitute insurance regulation within the meaning of section 514, they were preempted as relating to an ERISA plan of employer-provided welfare benefits.

In retrospect, *Dedeaux* was a lost opportunity to examine the relationship between section 514(a) and the rest of ERISA. As a result, *Dedeaux* was also a turning point (not fully appreciated at the time) in expanding the impact of ERISA preemption from employer plans to the service providers engaged by those plans. In *Dedeaux*, the Solicitor General, appearing amicus curiae, urged the Court to hold section 502, ERISA's claims provision, the exclusive set of remedies against ERISA plans.⁵³ The Court

⁵⁰ *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983).

⁵¹ 481 U.S. 41 (1987).

⁵² *Id.* at 47 (citations omitted).

⁵³ *See id.* at 52.

agreed, declaring that "the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme" that had its own "pre-emptive force" vis-à-vis state law remedies.⁵⁴

This formulation raises a question which the Court did not address: if section 502 (and, by extension, other provisions of ERISA) on their own preempt conflicting state law, what is the function of section 514?⁵⁵ Or, to reframe the inquiry, if section 514(a) explicitly governs ERISA's preemptive effect, what role is left for the Court's implicit preemption doctrine?

Moreover, *Dedeaux* involved an employee's lawsuit not against his employer's medical plan, but against a service provider hired by the plan, i.e., an insurance carrier. Under the expansive *Shaw* approach to section 514(a), the distinction between lawsuits against plans and actions against such service providers is of no moment, since a claim against a service provider has "a connection with" the plan and is, per *Shaw*, preempted. However, as I discuss below,⁵⁶ a careful reading of section 502, in the context of the ERISA provisions touching upon service providers, highlights the distinction between plans (subject to extensive ERISA regulation) and the service providers engaged by plans (not subject to such regulation). The distinction between plans and service providers proves important when we turn to the current controversy about ERISA preemption, the state tort law liability of service providers like managed care organizations, and the states' legal ability to regulate such organizations.⁵⁷

Section 514's relationship with the rest of ERISA, as well as the capaciousness of the *Shaw* standard, are central to *Mackey v. Lanier Collection Agency & Service, Inc.*,⁵⁸ a case which, for the first time in the ERISA preemption setting, divided the Court.⁵⁹ In *Mackey*, a collection agency sought to satisfy judgments by garnishing amounts owed to workers by a vacation pay plan, an ERISA-covered welfare arrangement.⁶⁰ A specific Georgia statute prohibited the garnishment of welfare plan benefits; the Court easily and unanimously found this statute preempted. The Court had greater difficulty determining whether ERISA preempted

⁵⁴ *Id.* at 54.

⁵⁵ My answer starts with the uncertainty of determining whether state and federal law conflict or whether Congress has occupied the relevant field. Section 514(a) is best understood as shaping the inquiry by creating a presumption for preemption in contrast to the traditional presumption against preemption.

⁵⁶ See discussion *infra* notes 178-87 and accompanying text.

⁵⁷ See *infra* notes 178-93 and accompanying text.

⁵⁸ 486 U.S. 825 (1988).

⁵⁹ Until *Mackey*, the Court's preemption decisions had been unanimous.

⁶⁰ See ERISA § 3(1), 88 Stat. 829, 833 (1974).

Georgia's general garnishment statute insofar as judgment creditors sought to use such statute to reach welfare plan benefits.

In *Mackey*, a five-Justice majority found against such preemption. Critical to the majority's reasoning was the need for a mechanism to enforce judgments against ERISA plans, if a plan has liability under section 502 which it refuses to pay or if a plan has liability from "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan."⁶¹ Since ERISA does not provide a device to enforce judgments against recalcitrant plans, it is necessary in such cases to utilize state law procedures such as Georgia's general garnishment statute.

Of equal concern to the Court's majority was ERISA section 206(d), which specifically requires pension plans to contain spendthrift clauses protecting pension benefits from alienation and assignment. To construe section 514(a) as accomplishing the same protection for welfare arrangements (via the preemption of state garnishment laws), would, the majority reasoned, render section 206(d) redundant.⁶²

The four member minority viewed the majority's concern about the enforcement of judgments against plans as irrelevant to *Mackey*, since *Mackey* involved a garnishment order requiring a welfare plan to retain the funds owed to a participant to satisfy the participant's debt, not an order against the plan to collect money owed by the plan on its own behalf. As to section 206(d), the minority acknowledged the redundancy problem, but countered that the majority (by upholding state garnishment laws as applied to welfare programs) was rendering redundant section 514(b)(7). That provision, adopted by Congress in 1984, saves from ERISA preemption state law garnishments to enforce certain "qualified domestic relations orders."⁶³ Unless section 514(a) generally preempts state garnishment laws, the minority reasoned, it was unnecessary for section 514(b)(7) to save such laws from preemption in the context of qualified domestic relations orders.

Mackey and the division in the *Mackey* Court highlight the problematic nature of the *Shaw* relate-to standard. In the final analysis, neither the *Mackey* majority nor the minority relied on section 514(a) or *Shaw* to resolve the case, but invoked other

⁶¹ *Mackey*, 486 U.S. at 833. Presumably, the torts being referred to are not the kinds of tort claims which *Dedeaux* held preempted by sections 502 and 514.

⁶² As I note *infra* notes 157-58 and accompanying text, a different understanding is that section 206(d) requires employers to include spendthrift clauses in pension plans; welfare plans are free to include such clauses or not.

⁶³ 18 U.S.C. § 1144(b)(7) (1994).

provisions of ERISA—sections 206(d), 502, and 514(b)(7)—to answer the preemption inquiry. But that approach begs a central question under the statute: if the provisions of ERISA, by virtue of their detailed and comprehensive nature, override state law as a matter of implied preemption, what is the meaning of section 514 and its explicit preemption mandate?

A second notable aspect of *Mackey* is the majority's effort to reformulate the outer boundary of ERISA preemption. Eschewing the *Shaw* Court's formula of that boundary ("tenuous, remote, or peripheral"),⁶⁴ the *Mackey* Court denoted as "run-of-the-mill"⁶⁵ those state laws beyond the scope of section 514(a) and its relate-to standard. This reformulation of the outer bounds of ERISA preemption is ultimately no more helpful than the *Shaw* test it supplements, suggesting the difficulties of finding limits under *Shaw*'s capacious understanding of the statute's "relate to" terminology.

The Court's unanimity essentially reappeared in *FMC Corp. v. Holliday*,⁶⁶ when the Court held a Pennsylvania anti-subrogation statute preempted as it would have applied to employers' self-funded medical plans. In *FMC*, an employee's child was injured in an automobile accident; the employer's self-funded medical plan paid a portion of the child's medical bills. The employee sued the driver on his child's behalf and obtained a settlement. The plan then sought reimbursement from the settlement proceeds pursuant to a subrogation clause in the plan. The employee resisted, citing a Pennsylvania statute outlawing subrogation as to motor vehicle tort recoveries. The Court found the Pennsylvania statute protecting such recoveries ERISA-preempted, thus permitting the plan to enforce its subrogation provision and obtain reimbursement for its outlay from the settlement proceeds.

The *FMC* Court began its analysis with the by-now familiar *Shaw* test: the Pennsylvania anti-subrogation law related to an employee benefit plan because it had "a connection with or reference to such a plan."⁶⁷ The Court buttressed this conclusion by noting the importance of ERISA preemption in establishing national uniformity: if Pennsylvania's anti-subrogation policy stood as to ERISA plans, an interstate employer would be required to calculate benefit levels differently in Pennsylvania than in other states permitting subrogation.⁶⁸

⁶⁴ *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983).

⁶⁵ *Mackey*, 486 U.S. at 833.

⁶⁶ 498 U.S. 52 (1990) (Stevens, J., dissenting).

⁶⁷ *Id.* at 58 (citation omitted).

⁶⁸ *See id.* at 60.

The Court acknowledged that the Pennsylvania anti-subrogation statute passed muster as an insurance law; however, Pennsylvania cannot deem self-funded plans to be insurance carriers. Hence, as to the self-funded *FMC* plan, ERISA precluded Pennsylvania from applying its anti-subrogation statute. In interpreting section 514 in this manner, the *FMC* Court acknowledged "the presumption that Congress does not intend to pre-empt areas of traditional state regulation."⁶⁹ Again, however, the Court did not deploy this presumption at the first step in the section 514 analysis, i.e., in determining whether the Pennsylvania anti-subrogation statute relates to welfare plans, but only after that inquiry was completed and the analysis moved to the second and third steps of applying the insurance exemption and the deemer clause.

In contrast, Justice Stevens, the lone dissenter in *FMC*, would have used the presumption against preemption at the first stage of the section 514 analysis and would have found, on that basis, that the Pennsylvania statute did not relate to welfare plans within the meaning of section 514(a)—a position close to that ultimately adopted by the Court in *Travelers*.⁷⁰

At one level, the Court's next ERISA preemption decision, *Ingersoll-Rand v. McClendon*,⁷¹ resembled its earlier pronouncement in *Dedeaux*. Like *Dedeaux*, *Ingersoll-Rand* involved a plan participant who sued in state court under a tort theory. In *Ingersoll-Rand*, the participant was apparently⁷² fired months before vesting in his employer's qualified deferred compensation plan. The participant claimed that he had been terminated to prevent such vesting and that, as a matter of state law, this termination constituted tortious conduct by the employer. A divided Texas Supreme Court agreed, recognizing a state law tort when employers fire employees to minimize employers' pension costs.

The United States Supreme Court subsequently held the Texas tort preempted, explicitly by section 514(a) and implicitly by ERISA's remedy provisions. The Court easily and unanimously found that the Texas tort relates to the employer's ERISA-regulated pension plan since, under the Texas court's analysis,

⁶⁹ *Id.* at 62.

⁷⁰ See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). But this position is not identical since *Travelers* effectively provides tougher scrutiny of certain state laws. See discussion *infra* notes 117-19 and accompanying text.

⁷¹ 498 U.S. 133 (1990).

⁷² Neither the fired participant nor his former employer seems to have initially recognized that the participant indeed did have sufficient service to vest.

"there simply is *no* cause of action if there is no plan."⁷³

Moreover, six of the nine Justices⁷⁴ also held that ERISA's remedy provisions preempt the Texas tort under principles of implied "conflict pre-emption."⁷⁵ ERISA section 510 proscribes pension-motivated firings; ERISA section 502 (also central to the Court's analysis in *Dedeaux*) authorizes a federal cause of action to enforce employees' ERISA rights. Together, the six Justices concluded, these provisions provide the employee with his exclusive remedy, by implication preempting any state law cause of action.

Like *Dedeaux*, *Ingersoll-Rand* leaves unexamined the relationship between section 514(a) and implied preemption analysis: If provisions of ERISA other than section 514(a) displace state law under the Court's traditional implied preemption doctrine, what is the role of section 514(a) and its explicit statement of ERISA preemption? If section 514(a) reaches beyond that doctrine, striking state laws which would otherwise survive the Court's regular approach to implicit preemption, it is irrelevant that, absent section 514(a), ERISA would preempt some state laws anyway.⁷⁶ On the other hand, reading section 514(a) as coterminous with the Court's standard implied preemption analysis renders that section superfluous.

There is, moreover, a difference between *Dedeaux* and *Ingersoll-Rand* which, while logically ignored under *Shaw*, becomes critical under a more searching reading of the statute: *Dedeaux* was an action against a service provider, in particular, the insurer hired by the employer's medical plan; *Ingersoll-Rand*, in contrast, was an action against an employer. If, per *Shaw*, the test for preemption is whether a claim has "a connection with" an ERISA plan, both kinds of actions are properly viewed as preempted. If, however, the entire text of ERISA is considered,⁷⁷ ERISA treats employers differently from service providers, regulating extensively the former but not the latter. As I argue below, it is consequently appropriate to read ERISA's remedies as occupying the field as to employer misbehavior, but not as occupying the field vis-à-vis service providers and their relations with plan participants.

⁷³ *Ingersoll-Rand*, 498 U.S. at 140.

⁷⁴ Justices Marshall, Blackmun, and Stevens expressed no opinion on this subject.

⁷⁵ *Ingersoll-Rand*, 498 U.S. at 145.

⁷⁶ This perspective buttresses the decision of the three Justices who joined *Ingersoll-Rand* to the extent it struck the Texas tort under section 514(a), but who did not join the Court's discussion of traditional conflict preemption and sections 502 and 510, as, from this perspective, the latter discussion was dicta.

⁷⁷ See *infra* notes 159-62 and accompanying text.

*John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*⁷⁸ again explored the relationship among ERISA preemption, the Court's regular preemption doctrine, and section 514's exception for state insurance laws. While the issues in *John Hancock* were quite technical, at its core, the *John Hancock* controversy was about the employer's ability to utilize funds an insurance company held for the employer's qualified plan. If the funds were characterized as normal insurance reserves, the employer had to prove its entitlement to those funds under contract, tort, or insurance law theories; on the other hand, if the funds held by the insurer were properly classified as assets of the employer's plan and if the insurer was also a fiduciary with respect to these funds, the insurer's handling of these funds was subject to the higher standards of ERISA's fiduciary rules which forbid self-interested behavior by the insurer as fiduciary. This, in turn, made it easier for the employer to reach these funds since it was simpler for the employer to show self-interested behavior by the insurer than for the employer to demonstrate the employer's entitlement under contract, tort, or insurance law theories.

In holding that the funds held by the insurer were indeed plan assets subject to ERISA's fiduciary standards, the Court, *inter alia*, rejected the insurer's contention that section 514's preservation of state insurance law effectively preempts federal law, awarding state insurance regulation exclusive jurisdiction over funds held by insurers, even for ERISA plans. In rejecting this approach, the *John Hancock* Court first noted that "[s]tate laws concerning an insurer's management of general account assets can 'relate to [an] employee benefit plan' and thus fall under the preemption clause [of section 514(a)], but they are also, in the words of the saving clause, laws 'which regulat[e] insurance.'"⁷⁹ Moreover, the saving clause—section 514's exemption for state insurance laws—does not, the Court held, "alter . . . preemption analysis."⁸⁰ Thus, state insurance laws and federal laws affecting insurance co-exist with federal law preempting when the two conflict.

As a construction of section 514, this analysis is compelling: section 514(a) and its "relate to" standard provide for more stringent preemption than does normal implied preemption analysis with its presumption against the displacement of state law; section 514's exemption provisions restore state insurance, banking, securities, and criminal laws to these traditional preemption standards, more solicitous of state law. This analysis

⁷⁸ 510 U.S. 86 (1993).

⁷⁹ *Id.* at 99 (first and third alterations in original).

⁸⁰ *Id.* at 87.

also highlights the problem with the alternative view (subsequently embraced by the Court in *Travelers*) that section 514(a) merely embodies the conventional principles of implied preemption, in particular, the traditional presumption against preemption. Under that understanding of section 514(a), the exemption provisions are, as a textual matter, most plausibly read as reducing the quantum of federal preemption for the protected categories of state law below traditional levels of implied preemption scrutiny, effectively turning section 514 into an anti-preemption provision.

The last of the Court's *Shaw*-based preemption cases⁸¹ was *District of Columbia v. Greater Washington Board of Trade*,⁸² in which the Court struck on preemption grounds a District of Columbia ("D.C.") statute which requires employers providing health insurance to furnish the same insurance to injured employees receiving workers' compensation. Labeling the *Shaw* approach to section 514(a) as "true to the ordinary meaning of 'relate to,'"⁸³ the Court, summarizing the *Shaw*-based case law, declared that section 514(a) preempts state laws even if such laws are "not specifically designed to affect"⁸⁴ ERISA plans, even if the effect of state laws on ERISA arrangements "is only indirect,"⁸⁵ and even if state laws are "consistent with ERISA's substantive requirements."⁸⁶ Since the D.C. statute "specifically refers to welfare benefit plans regulated by ERISA,"⁸⁷ i.e., the employer-provided medical coverage which the statute extends to workers' compensation recipients, the statute is preempted by section 514(a).

To summarize: *Shaw* and its progeny, through *Washington Board of Trade*, understand section 514(a) capaciously. For the first stage of ERISA preemption analysis—determining whether a challenged state law "relates to" ERISA-covered plans—*Shaw* mandates an inquiry far more expansive than the Court's normal doctrine of implied preemption. While that implied preemption doctrine employs a presumption against preempting state law, *Shaw* goes well beyond a presumption in the opposite direction, making preemption nearly automatic. Under *Shaw*, any reference to or connection with an ERISA-regulated plan brings state law

⁸¹ This is my characterization; the Court itself, as I discuss *infra* notes 100-20 and accompanying text, has been unwilling to acknowledge *Travelers* as commencing a new line of cases and thus recognize *Washington Board of Trade* as ending an old one.

⁸² 506 U.S. 125 (1992).

⁸³ *Id.* at 129.

⁸⁴ *Id.* at 130 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)).

⁸⁵ *Id.* (quoting *Ingersoll-Rand*, 498 U.S. at 139).

⁸⁶ *Id.* (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)).

⁸⁷ *Id.*

within the contours of section 514(a) and ERISA preemption. Only at the second stage of analysis (pertaining to state insurance, banking, securities, and criminal laws) does the *Shaw* case law resort to traditional, i.e., deferential, preemption standards since these laws are protected statutorily from the exacting scrutiny of section 514(a).

The Court's *Shaw*-based preemption case law does recognize that there must be limits to the sweep of section 514(a); however, the Court's efforts to define those limits ("remote," "peripheral," "tenuous," "run-of-the-mill")⁸⁸ have not been successful.

If the particular outcomes reached under the *Shaw* rubric were sometimes unpalatable for the Court, those results could nevertheless be explained as implementing Congress's explicit command to preempt state laws broadly when such laws relate to ERISA-covered plans. That congressional command could, in turn, be understood as mandating national uniformity and employer autonomy for pension and welfare programs, plausible policies albeit ones with their own costs.

It was, however, inevitable that a case would come before the Court where a *Shaw*-based outcome would prove more troubling, a case which would finally cast the *Shaw* framework as the Godzilla of preemption, crushing everything in its path.

III. TRAVELERS AND THE NEW CASE LAW OF ERISA PREEMPTION

The case which broke the *Shaw* framework was *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,⁸⁹ which involved surcharges New York State imposes as part of its regulation of hospital rates. Under New York's regulatory scheme, hospitals charge patients covered by Blue Cross/Blue Shield, Medicaid, or an HMO only basic billing rates for their hospital stays.⁹⁰ Other patients, e.g., those covered by commercial insurers, by self-insured funds, or by volunteer firefighter benefits, pay to the hospital an additional thirteen percent (13%) surcharge for their hospitalizations. Hospitalized patients covered by commercial insurance also pay a second surcharge of eleven percent (11%) which the hospital remits to the state.⁹¹

⁸⁸ See *supra* notes 64-65 and accompanying text.

⁸⁹ 514 U.S. 645 (1995).

⁹⁰ These rates are based on 794 standard Diagnostic Related Groups. See *id.* at 649.

⁹¹ New York also levies a direct surcharge on HMOs based on their respective monthly payments for members' hospital care; the amount of this surcharge varies with the HMOs' Medicaid enrollment but can reach a maximum of nine percent (9%) of the HMOs'

The obvious impact of these surcharges is to encourage employers to switch from commercial insurance and self-funding to Blue Cross/Blue Shield coverage: a hospital bill of \$200 for a Blue Cross/Blue Shield patient is, by virtue of the surcharge scheme, \$226 for a patient participating in his employer's self-funded plan and \$248 for a patient serviced by commercial insurance.

Applying the *Shaw*-based case law, the United States Court of Appeals for the Second Circuit held that section 514(a) preempts this scheme of hospital surcharges;⁹² indeed, under the *Shaw* framework, *Travelers* is a straightforward case. In *Metropolitan Life*, the Court, applying *Shaw*, held that the Massachusetts statute mandating mental health coverage in insurance policies relates to ERISA plans by constricting the choices confronting such plans: the Massachusetts statute forces employers providing medical benefits either to purchase insurance with mental health coverage or to self-fund; the state law denies employers the option of purchasing insurance without mental health benefits.⁹³ Thus, the Massachusetts statute, per *Shaw*, relates to employers' ERISA-covered plans since the statute has a "connection with" such plans, i.e., an "indirect[] but substantial[]"⁹⁴ influence on employers' choices. The same is evidently true of the New York surcharge scheme.⁹⁵

In *Metropolitan Life*, the state law which triggered section 514(a) as relating to ERISA-covered plans ultimately avoided preemption because, at the second stage of analysis, the law fell within the protected category of insurance regulation. In contrast, the New York hospital surcharges do not come within any of the four exempted categories and thus, having triggered section 514(a), are preempted under the *Shaw* framework.

In the last case in the *Shaw* line, *Washington Board of Trade*,

outlays for its members' hospital care. See *id.* at 650.

⁹² See *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993).

⁹³ See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1984).

⁹⁴ *Id.* at 739.

⁹⁵ Arguably, employers' choices were more severely constricted in *Metropolitan Life* than in *Travelers* since the Massachusetts statute in *Metropolitan Life* absolutely prohibits insurance policies without mental health benefits; the New York surcharges, in contrast, do not ban self-funding or commercial insurance coverage, but penalize via higher effective hospital rates the employer's decision to self-fund medical coverage or to utilize commercial insurance rather than Blue Cross/Blue Shield coverage. It is, however, difficult to discern in the *Shaw* approach a distinction between state laws which penalize particular employer choices and state laws which ban certain choices; both kinds of laws have a "connection with" employers' medical plans. *Shaw* defined the outer boundary of ERISA preemption as state laws having only "tenuous," "remote," or "peripheral" impact on ERISA-regulated plans; a 24% cumulative surcharge on hospital rates is difficult to characterize in such terms.

the Court, quite accurately summarizing the evolution of the *Shaw* relate-to test, reiterated that section 514 preempts state laws even if such laws are "not specifically designed to affect"⁹⁶ ERISA plans, even if the effect of such laws on ERISA plans "is only indirect,"⁹⁷ and even if such state laws are "consistent with ERISA's substantive requirements."⁹⁸ Given that broad understanding of ERISA preemption as it had evolved under *Shaw*, it is not surprising that the Second Circuit held that section 514(a) preempts New York's hospital surcharges.⁹⁹

As is evident from the Supreme Court's opinion in *Travelers*, that conclusion was ultimately unacceptable to the Court. However questionable some of the results under the *Shaw* line might have been, the Court—until *Travelers*—viewed those results as mandated by the literal terms of the statute and as justified by reasonable policy rationales, principally, the need to free interstate employers from inconsistent state regulation of such employers' welfare plans.

However, applying *Shaw* to New York's hospital surcharges would have effectively dismantled states' regulation of hospital rates, indeed, would potentially have destroyed all state regulation of medical care since roughly half of medical care in the United States is purchased via employer-provided plans.¹⁰⁰ Under the capacious *Shaw* test of near automatic preemption, as originally formulated in *Shaw* and as applied by subsequent case law, virtually any state regulation of medical care relates to such plans, i.e., has a "connection with" them. Had the Court, per *Shaw* and its progeny, invalidated states' regulation of hospital fees as relating to employer-provided medical plans, no principle would have stopped preemption there. Rather, the invalidation of New York's hospital surcharges would logically have been the first step in dismantling the state law framework governing health care, heavily financed via ERISA-regulated plans. Finding this an

⁹⁶ *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)).

⁹⁷ *Id.* (quoting *Ingersoll-Rand*, 498 U.S. at 139).

⁹⁸ *Id.* (quoting *Metropolitan Life*, 471 U.S. at 739).

⁹⁹ While the United States Court of Appeals for the Second Circuit nominally placed its primary reliance on *Ingersoll-Rand*, its analysis fits more comfortably with the facts and reasoning of *Metropolitan Life*. See *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 719 (2d Cir. 1993) ("[T]he surcharges purposely interfere with the choices that ERISA plans make for health care coverage. Such interference is sufficient to constitute 'connection with' ERISA plans.").

¹⁰⁰ For a discussion of reasons for this, see Theodore R. Marmor & Michael S. Barr, *Making Sense of the National Health Insurance Reform*, 10 YALE L. & POL'Y REV. 228, 256 (1992) ("There is very little evidence that Americans prefer the employer-based aspect of our present arrangements, rather than the tax-subsidy aspects of it.").

unacceptable result, the Supreme Court abandoned the *Shaw* framework, but in a fashion neither wholly candid nor wholly convincing.

The Court bottomed its *Travelers* analysis upon the observation that preemption doctrine has traditionally begun with the "presumption that Congress does not intend to supplant state law."¹⁰¹ Moreover, if the critical phrase of section 514(a)—"relate to"—"were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere."¹⁰²

Had there been no *Shaw* line of cases, both of these pronouncements might have been unexceptionable; given the existence of *Shaw* and its progeny, both of these pronouncements are problematic: in the *Shaw* cases, the Court never deployed the traditional presumption against preemption at the first stage of the analysis, in determining whether a state law relates to ERISA plans for purposes of section 514(a). That presumption, when it enters the *Shaw* jurisprudence, enters only at the second stage, in applying the special exemptions for state banking, securities, insurance, and criminal laws. Moreover, the capacious *Shaw* test—if it does not extend to the furthest stretches of indeterminacy—comes fairly close, i.e., to the hard-to-define territory where state laws are too "remote," "tenuous," "peripheral," or "run-of-the-mill" to be preempted.¹⁰³ It is, furthermore, difficult, as a textual matter, to view section 514 as a mere restatement of the Court's implied preemption doctrine with its predisposition against preemption.¹⁰⁴

Declaring the precise text of section 514(a) "unhelpful,"¹⁰⁵ the *Travelers* Court turned its attention to the legislative purpose of ERISA preemption: "to avoid a multiplicity of [state] regulation in order to permit the nationally uniform administration of employee benefit plans."¹⁰⁶ Reviewing *Shaw*, *FMC*, and *Ingersoll-Rand*, the *Travelers* Court found that the state laws at issue in these cases "mandated employee benefit structures or their administration"¹⁰⁷ or provided "alternate enforcement mechanisms"¹⁰⁸ and thus

¹⁰¹ New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995).

¹⁰² *Id.* at 655 (alteration in original)(citation omitted).

¹⁰³ See *supra* notes 64-65 and accompanying text.

¹⁰⁴ See discussion *supra* notes 116-17 and accompanying text.

¹⁰⁵ *Travelers*, 514 U.S. at 646.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 658.

¹⁰⁸ *Id.*

frustrated the policy of national uniformity. In contrast, the New York hospital surcharges merely have an "indirect economic effect on choices made by insurance buyers, including ERISA plans,"¹⁰⁹ making commercial insurance and self-funding less attractive than Blue Cross/Blue Shield coverage; hence, no ERISA preemption.

To buttress its conclusion sustaining New York's hospital surcharges, the *Travelers* Court noted that, if state laws are preempted because of their "indirect economic influence"¹¹⁰ on ERISA plans, there is virtually no limit to the reach of such preemption. For example, states' "basic regulation of employment conditions will invariably affect the cost and price of [hospital] services."¹¹¹ However, the Court continued, it is unlikely that Congress intended for ERISA preemption to reach this far and thus "displace general health care regulation, which historically has been a matter of local concern."¹¹²

Washington Board of Trade had recently and contrariwise reaffirmed that section 514(a) preempts laws affecting ERISA plans indirectly; indeed, the statute struck in *Washington Board of Trade* as ERISA-preempted regulated an area which "historically has been a matter of local concern"¹¹³—workers' compensation. In apparent recognition of this difficulty, the *Travelers* Court then took a final stab at its new standard for ERISA preemption: indirect effects will result in preemption if such effects are "acute."¹¹⁴ New York's surcharges, however, do not fall within this category since "they affect only indirectly the relative prices of insurance policies, a result no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate."¹¹⁵

Of course, reasonable people can disagree whether a twenty-four percent (24%) cumulative surcharge for commercially-insured patients creates an "acute" effect. It is, however, beyond peradventure that the resulting test for ERISA preemption—whether a challenged state law creates an indirect, but acute, economic effect—cannot be found in *Shaw* or its progeny.

Confronted with the unpalatable results to which *Shaw* was pointing—the progressive dismantling of state regulation of medical care as preempted by ERISA—it is understandable that the *Travelers* Court reconsidered the *Shaw* framework. However,

¹⁰⁹ *Id.* at 646.

¹¹⁰ *Id.* at 659.

¹¹¹ *Id.* at 660.

¹¹² *Id.* at 661.

¹¹³ *Id.*

¹¹⁴ *Id.* at 668.

¹¹⁵ *Id.*

for three reasons, *Travelers* is not a persuasive reading of section 514. First, if, as *Travelers* indicates, section 514(a) merely embodies the Court's traditional standards of implied preemption, why did Congress bother enacting section 514? The Court's preemption doctrine is well-established¹¹⁶ part of the legal environment against which Congress enacted ERISA in 1974; had there been no section 514, the Court's normal implied preemption standards would, by default, have governed ERISA; there is no apparent reason why those who drafted section 514 would have felt compelled to restate prevailing preemption doctrine statutorily.

Second, *Travelers* ignores the difficult textual problem presented by section 514's exemptions for state banking, securities, insurance, and criminal laws. If, as *Travelers* indicates, section 514(a) incorporates a presumption against preemption, it is hard to see that from which these laws are exempted. Indeed, if section 514(a) merely declares the Court's regular preemption doctrine with a predisposition against preemption, the four protected categories are, from a textual perspective, most plausibly read as removing state banking, securities, insurance, and criminal laws from standard preemption analysis, thereby relegating such laws to lower than normal levels of preemption scrutiny. Under this approach, section 514 becomes an anti-preemption provision—a result which is, at the least, counterintuitive.

Finally, *Travelers* is internally inconsistent, proclaiming a presumption against preemption in ERISA cases while simultaneously preserving the *Shaw*-based case law incompatible with that presumption.

One reading of *Travelers* is that, as to state laws affecting benefits, administration, and remedies, something akin to the *Shaw* approach continues, notwithstanding *Travelers*'s proclaimed embrace of a presumption against preemption for ERISA purposes. Under this construction of *Travelers*, one tier of state laws—those which do not impact upon benefits, administration, and remedies—will be subject to traditional, deferential preemption analysis while state laws affecting benefits, administration, and remedies will be subject to *Shaw*-type treatment—near automatic preemption.¹¹⁷

¹¹⁶ The Court's preemption doctrine is not without its own difficulties. However, that doctrine is part of the legal environment against which Congress adopted ERISA. See, e.g., Grey, *supra* note 41.

¹¹⁷ Professors Mashaw and Marmor are skeptical of the extent to which *Travelers* changed the law of ERISA preemption. Their skepticism appears to be premised upon an understanding of *Travelers* similar to that discussed in the text. See Jerry L. Mashaw & Theodore R. Marmor, *Federalism and Health Care: A Reply*, 28 CONN. L. REV. 161, 165

There is, however, no warrant in the terminology of section 514(a) (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any" ERISA-covered plan) for a two-tier approach which treats some state laws differently than others.¹¹⁸ Moreover, *Travelers* suggests no rationale for such differential treatment other than that state laws affecting plan administration, benefits, and remedies were previously litigated under the capacious *Shaw* approach and found preempted under that approach. Ultimately, this approach, by subjecting some state laws to heightened preemption scrutiny, cannot be reconciled with the *Travelers* Court's simultaneous declaration of a presumption against preemption.

An alternative reading of *Travelers* is that its presumption against preemption applies across-the-board but that, when ERISA regulates, it does so in such detail that the presumption will generally be overcome. This reading is plausible as to state laws affecting plan administration and remedies, areas where ERISA provides sufficiently elaborate regulation that, even with a supposition against preemption, ERISA will generally preempt.

However, this approach fails to explain why, per *Travelers*, state laws affecting the substance of welfare plans are preempted. The absence of substantive federal regulation of welfare plans, when combined with the traditional presumption against preemption, indicates that there is no preemption of state laws affecting the content of welfare plans since there is no affirmative federal regulation occupying the relevant field. *Travelers*'s embrace of traditional preemption analysis contradicts *Travelers*'s simultaneous assertion that state laws affecting plan benefit structures are generally preempted since, under the traditional analysis, the lack of federal regulation, coupled with the predisposition against preemption, implies that the states are free to fill the regulatory void as to welfare plans.

A sympathetic observer (and I am one) could explain *Travelers*'s unsatisfactory disposition of the cases decided under *Shaw* as reflecting the Court balance of conflicting needs. On the one hand, the Court, for the normal reasons, e.g., reliance interests, judicial self-discipline, desired to maintain its precedent intact, precedent which, under *Shaw*, struck broadly at state laws affecting benefits, plan administration, and remedies. On the

(1995); see also *Prudential Ins. Co. v. National Park Med. Ctr.*, 154 F.3d 812, 820 (8th Cir. 1998) ("[W]e do not read *Travelers* to reject all of its prior precedent on the scope of ERISA preemption or as a wholesale rejection of the mode of analysis employed in the Court's prior precedent.").

¹¹⁸ ERISA § 514(a), 88 Stat. 829, 897 (1974).

other hand, the Court, with equal plausibility, needed to reform its understanding of ERISA preemption given the unpalatable implications of the *Shaw* line of cases which threatened to nullify basic state regulation of health care; the Court's chosen instrument for such reform was the traditional presumption against preemption.

But *Travelers*, by deploying the traditional presumption against preemption, undercut the logic of the *Shaw*-based precedent, precedent which the Court wanted to preserve, but which is based on the contrary premise of near-automatic preemption. *Travelers* avoids this dilemma by ignoring it, preserving the *Shaw*-based case law by little more than judicial fiat. As I discuss later,¹¹⁹ a more forthright recognition by the Court that it has altered its understanding of section 514(a) could provide a more persuasive basis for preserving much (though not all) of its prior case law while avoiding the pitfalls of the overly-expansive *Shaw* approach.

To summarize: the capacious *Shaw* test, applied to New York's hospital surcharge scheme, would preempt that scheme as relating to employers' ERISA-regulated medical plans and would, by extension, undermine most (perhaps all) of the states' regulation of medical care since such care is heavily financed by ERISA-governed arrangements; the limits to preemption developed under the *Shaw* approach ("remote," "tenuous," "peripheral," "run-of-the-mill")¹²⁰ do not convincingly save New York's hospital surcharges from preemption; quite reasonably, the *Travelers* Court did not want to invalidate as ERISA-preempted New York's surcharges; it was thus necessary to reformulate the Court's *Shaw*-based jurisprudence of ERISA preemption; consequently, the Court introduced into the first step of section 514 analysis the traditional presumption against preemption. However, deploying that presumption eroded the premise of the Court's *Shaw*-based case law, case law bottomed on an expansive understanding of the statutory "relate to" test; nevertheless, the *Travelers* Court persisted in seeing no contradiction between its preservation of the *Shaw* line of cases and the Court's simultaneous repudiation of the expansive reading of section 514(a) upon which that line is based. The upshot is the internally inconsistent opinion in *Travelers*.

California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,¹²¹ dispels any possibility that

¹¹⁹ See *infra* Part IV.B.

¹²⁰ See *supra* notes 64-65 and accompanying text.

¹²¹ 519 U.S. 316 (1997).

Travelers is aberrational. *Dillingham* makes clear both that there will be no return to *Shaw* and that the Court is reluctant to admit that this is so.

California law allows a contractor to pay lower than prevailing wages to apprentices working on public construction projects, but only if California has approved the apprenticeship program. Separately-funded apprenticeship programs are ERISA-covered welfare plans.¹²² California's prevailing wage statute and its exception for approved apprenticeship programs do not fall within any of the statutory categories protected from section 514(a), viz., state banking, insurance, securities, or criminal laws. Under *Shaw* and its progeny, the California prevailing wage statute relates to ERISA plans by permitting lower than prevailing wages on public construction projects for apprentices in approved apprenticeship arrangements; hence, under the *Shaw* formula, the statute is preempted.¹²³

While paying nominal obeisance to *Shaw*, the *Dillingham* Court made clear that the contrary principles of *Travelers* govern: preemption analysis begins with the presumption that Congress intends federal and state law to coexist unless Congress "clear[ly] and manifest[ly]"¹²⁴ indicates an intent to preempt; a state law with an "indirect economic influence"¹²⁵ on an ERISA-covered plan does not "relate to" such plan for purposes of section 514(a); if ERISA were to preempt state laws regulating health care, "we could scarcely see the end of ERISA's pre-emptive reach;"¹²⁶ ERISA preemption is generally limited to state laws impinging upon plan administration and the design of plan benefits.

From these *Travelers*-based premises, *Dillingham* upholds the California statute restricting lower wage payments on public construction projects to apprentices in state-approved programs; "apprenticeship standards and the wages paid on state public works have long been regulated by the States."¹²⁷ These standards and wages are "quite remote"¹²⁸ from concerns about plan

¹²² See ERISA § 3(1), 88 Stat. 829, 833 (1974). Apprenticeship programs financed from employers' general revenues are not ERISA-covered plans.

¹²³ Insofar as California's statute is authorized by the federal statute governing apprenticeship programs, ERISA section 514(d) might preserve the California law as an extension of federal law. See *id.* § 514(d), at 897. However, since the Court held that the California statute does not "relate to" ERISA plans under section 514(a), it was unnecessary for the Court to consider the implications of section 514(d).

¹²⁴ New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (citations omitted).

¹²⁵ *Id.* at 659.

¹²⁶ *Dillingham*, 519 U.S. at 329.

¹²⁷ *Id.* at 330.

¹²⁸ *Id.*

administration and the design of plan benefits; it would be "unsettling"¹²⁹ for ERISA to preempt in areas of traditional state regulation, particularly as ERISA itself supplies no regulation in these fields; the controlling presumption is that Congress did not intend to preempt California law concerning apprenticeship programs and wages at public works sites.

The critical (albeit unstated) premise of *Dillingham* is that California's prevailing wage statute, insofar as it applies to apprentices on public construction projects, does not regulate the substantive content of apprenticeship programs, but merely establishes a reduced minimum wage, conditioned upon the apprenticeship program satisfying statutory standards. Given the premise that the California law does not substantively regulate the terms of apprenticeship programs,¹³⁰ *Dillingham* logically flows from *Travelers* and *Travelers*'s more restrictive approach to ERISA preemption utilizing the presumption against preemption.

The unpersuasive aspect of *Dillingham* is the Court's insistence that there is continuity between *Shaw* and *Travelers*. The problem is revealed most clearly in the *Dillingham* Court's concluding observation "that California's prevailing wage laws and apprenticeship standards do not have a 'connection with,' and therefore do not 'relate to,' ERISA plans."¹³¹ This attempt to associate *Dillingham* with *Shaw* fails on its face: per *Shaw* and its progeny, the California law restricting reduced wage payments on public works to those participating in approved apprenticeship programs is literally connected with such programs.

Concurring in the *Dillingham* result, Justice Scalia, along with Justice Ginsburg, called for more forthright acknowledgment that the Court has abandoned its prior understanding of ERISA preemption: the "illusory test"¹³² of the statutory "relate to" standard was "doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."¹³³ Justice Scalia would relegate section 514(a) to tautological status, a declaration that ERISA preempts only as to ERISA plans, but not as to anything else.

¹²⁹ *Id.* (citing *Travelers*, 514 U.S. at 665).

¹³⁰ The contrary (and not implausible) characterization is that California's prevailing wage statute regulates the substance of apprenticeship programs by restricting lower than prevailing wages to apprentices participating in approved programs. Under this characterization, per *Travelers* the California law is ERISA-preempted as the substantive regulation of the content of an ERISA program.

¹³¹ *Dillingham*, 519 U.S. at 334 (footnote omitted).

¹³² *Id.* at 335 (Scalia, J., concurring).

¹³³ *Id.* The *Travelers* Court had cited Henry James for this proposition. Thus, the Court seems to have covered all of its philosophical bases. See *Travelers*, 514 U.S. at 655.

Justice Scalia is right to suggest that *Travelers* and *Dillingham* depart significantly from the Court's prior *Shaw*-based jurisprudence of ERISA preemption and to call for greater candor in acknowledging the break between *Shaw* and *Travelers*.¹³⁴ However, Justice Scalia's proposed construction of section 514 is ultimately unpersuasive: as noted previously,¹³⁵ it is, as a textual matter, unconvincing to construe section 514(a) as a redundant statement of normal preemption doctrine, i.e., that ERISA preempts only as to ERISA plans. Such a construction is particularly difficult to square with section 514's exceptions for state banking, securities, insurance, and criminal laws, exceptions which imply that section 514(a) embodies greater than usual preemption scrutiny from which such laws are exempted.

Significantly, Justice Scalia traces the Court's "new approach to ERISA pre-emption," not to *Travelers*, but to the Court's earlier decision in *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*.¹³⁶ Justice Scalia cites *John Hancock* for the proposition that ERISA does not "alter traditional pre-emption analysis."¹³⁷ However, in making that observation, the *John Hancock* Court referred not to section 514(a) and the first stage of ERISA preemption analysis, but to section 514's protection for state insurance laws and the second stage of analysis, applying that protected category.¹³⁸ *John Hancock* held that state banking, insurance, securities, and criminal laws are not immunized from all preemption scrutiny, but remain subject to the Court's traditional preemption doctrine. However, that conclusion is only sensible if section 514(a), from which these state laws are exempt, embodies a more stringent than normal approach to preemption.

Thus, Justice Scalia's *Dillingham* concurrence properly defines the problem—the need to acknowledge the break between the Court's old and new approach to ERISA preemption—but does not provide a convincing reading of the text of section 514.

The third of the Court's new preemption cases, *De Buono v. NYSA-ILA Medical and Clinical Services Fund*,¹³⁹ was authored by Justice Stevens. If it overstates to say that in *De Buono* Justice

¹³⁴ See discussion *infra* Part IV.B.

¹³⁵ See discussion *supra* notes 116-17 and accompanying text.

¹³⁶ *Dillingham*, 519 U.S. at 336 (Scalia, J., concurring).

¹³⁷ *Id.* (quoting *John Hancock*, 510 U.S. at 89).

¹³⁸ See *John Hancock*, 510 U.S. at 99. Technically, *John Hancock* only construes ERISA's insurance exemption. Logically, *John Hancock*'s approach, i.e., regular preemption standards for state laws protected from ERISA preemption, applies as well to state banking, securities, and criminal laws.

¹³⁹ 520 U.S. 806 (1997).

Stevens's *FMC* dissent¹⁴⁰ became the majority view, it does not overstate by much. *De Buono* involved a New York state tax levied on the gross receipts of hospitals and similar facilities. The trustees of an ERISA-covered welfare plan objected to the tax as it applies to a medical clinic operated by their plan; the trustees claimed that section 514 preempts the tax.

Rejecting the trustees' claim, the *De Buono* Court upheld the New York tax on hospitals' gross receipts, relying on *Travelers* and *Dillingham* and the principles they embody: "a strictly literal reading of § 514(a)"¹⁴¹ is impossible since, taken literally, the statute's "relate to" standard has no boundaries; there is a presumption against preemption, particularly the preemption of "the historic police powers of the State includ[ing] the regulation of matters of health and safety."¹⁴² The New York gross receipts tax neither proscribes nor mandates particular benefits for employer-provided plans. In short, the New York tax is one of many laws of "general applicability" which, despite its impact on the facilities operated by an ERISA plan, is not ERISA-preempted.¹⁴³

As an application of the Court's normal implied preemption analysis, it is hard to fault *De Buono*. However, *De Buono* again ignores the textual problem of interpreting section 514(a) as a statement of the Court's regular implied preemption doctrine: Why would the drafters of section 514 have felt compelled to restate statutorily the Court's standard implied preemption doctrine? If section 514(a) merely embodies traditional preemption analysis, what do we make of the statutory exceptions for state banking, securities, insurance, and criminal laws?

One way of characterizing the problem is that the Court has framed its choices under section 514 as either near automatic preemption without discernible limits (i.e., *Shaw* and its progeny) or the Court's normal preemption doctrine (i.e., *Travelers* and its progeny) with more stringent treatment for state laws pertaining to benefit structures, plan administration, and remedies. The former approach leads to unpalatable results, preempting more broadly than the Court (and many observers, including me) thinks is proper; the latter approach disrespects the text of section 514, which is most convincingly read as commanding more than the Court's standard doctrine of implied preemption. The *Travelers* formula also preserves the Court's preexisting case law without

¹⁴⁰ See *FMC Corp. v. Holliday*, 498 U.S. 52, 65 (1990) (Stevens, J., dissenting).

¹⁴¹ *De Buono*, 520 U.S. at 813.

¹⁴² *Id.* at 814.

¹⁴³ *Id.* at 815.

confronting the inconsistency between that case law and the simultaneous assertion of a presumption against preemption.

The question thus becomes whether section 514 can be construed more workably to embody a middle way, i.e., more exacting than usual preemption scrutiny, but still scrutiny with reasonable limits. In the next section, I propose such an understanding of section 514 and ERISA preemption.

IV. CONSTRUING SECTION 514: A REASONED TEXTUALIST APPROACH

A. *Outlining the Approach*

In this section, I advance an alternative approach to ERISA preemption, an approach which can best be described as "reasoned textualism." This approach is textualist as it respects the statute—rather than judicial policy predilections or extra-textual legislative intent—as the primary source of law;¹⁴⁴ this approach is reasoned in that—in contrast to the mechanical textualism justly deprecated by the critics of *Shaw*—this approach seeks to make section 514 workable by considering the rest of ERISA, the legal environment in which section 514 was adopted (namely, the Supreme Court's jurisprudence of implied preemption), and the practical implications of the manner in which section 514 is understood.

As to state laws impinging upon areas where ERISA legislates, e.g., the administration of employee benefit plans, the fiduciary standards governing such plans, the substantive rules for pension plans, this approach utilizes the normal implied preemption questions—Has Congress occupied the field? Does state law conflict with federal law?—and thus mandates examination of particular provisions of the statute to determine if such conflict or occupation exists. However, to give content to section 514(a) and its "relate to" standard, the usual presumption protecting state law is reversed and preemption the rebuttably presumed outcome. Section 514(a) thus serves as a statutory canon of construction that, for preemption purposes, the provisions of ERISA be understood more, rather than less, broadly and consequently carry greater than usual preemptive force vis-à-vis state law; reasonably close cases are to be resolved in favor of preemption.

¹⁴⁴ Thus, the reasoned textualist approach contrasts with the analysis of those commentators who dismiss the statute as hopelessly unhelpful and call on judges to mold their own preemption jurisprudence for ERISA.

When state laws affect the substance of welfare arrangements, the standard implied preemption inquiry—Is there federal law which conflicts or occupies the field?—sustains such state laws since ERISA itself lacks substantive guidelines with which state law conflicts. However, my approach deems this conclusion incompatible with section 514 and its command for more than standard preemption doctrine. Accordingly, the reasoned textualist approach construes section 514 as forbidding state regulation of the content of welfare plans even though there is no federal law which conflicts or occupies the field. In this context, section 514(a) establishes a zone of employer autonomy as to the content of welfare plans; ERISA's silence as to that content is not an invitation for the states to intrude but, per section 514(a), a directive to stay out also.

For these purposes, the zone of employer autonomy is defined by reference to ERISA's substantive regulation of pensions:¹⁴⁵ if ERISA affirmatively regulates a particular facet of pension plans (e.g., the employees who must be covered by such plans), the combination of section 514 and ERISA's silence on that subject as to welfare plans consigns that subject to employer autonomy. Thus, as to a state law impacting upon the substance of welfare plans, the Court should ask whether such law intrudes upon the zone of employer autonomy defined by reference to ERISA's regulation of pension plans. If the challenged state law intrudes upon the zone of employer autonomy so defined, the law is ERISA-preempted and the zone thereby preserved from state as well as federal regulation.

Finally, if either a pension or welfare plan is touched by a state banking, securities, insurance, or criminal law, my approach reads the statute's exemptions for these four categories of state law as mandating regular implied preemption analysis with its predisposition against preemption.

This understanding of the statute gives content to section 514(a), treating it both as a reversal of the normal presumption against preemption and as a statutory statement of the zone of employer autonomy as to the substance of welfare plans. This construction of section 514 also preserves the textual integrity of the exceptions for state banking, securities, insurance, and criminal laws in the second step of the statutory analysis by ensuring that there is indeed something from which to except such laws, namely, section 514(a)'s presumption for preemption. This reading of section 514(a) avoids the problem that "everything is related to

¹⁴⁵ This methodology is developed further *infra* notes 163-66 and accompanying text.

everything else”¹⁴⁶ by construing section 514(a) as a command to expand preemption beyond traditional boundaries, by presuming preemption and by respecting the zone of employer autonomy as to the substance of welfare arrangements, but not as a charge to push the “relates to” terminology to its furthest possible reaches. Finally, this reading of section 514 abandons the problematic distinctions under *Travelers* among effects which are “direct,” “indirect,” and “indirect but acute.”

This approach to ERISA preemption is more workable and better respects the statute than does the *Travelers* formula which, by equating section 514 with the Court’s traditional preemption doctrine, leaves too many anomalies: Why did ERISA incorporate conventional preemption analysis statutorily when, as a matter of well-established case law, that analysis applied anyway? If section 514(a) merely incorporates traditional implied preemption standards, what do we make of the statutory exemptions for state securities, banking, insurance, and criminal laws? Why preserve the results of the pre-*Travelers* case law when the fundamental premise of *Travelers*—the traditional presumption against preemption—undercuts that case law?

B. *The Alternative Approach and the Shaw-Based Case Law*

In this subsection, I apply my approach to the cases decided by the Supreme Court under *Shaw* and conclude that, besides better respecting the statute than does the *Travelers* framework, this approach fits more comfortably with many of the Court’s prior decisions under section 514. When my formula produces different outcomes than *Shaw*, the difference is for the better, yielding more appropriate preemption outcomes.

Consider initially a situation where ERISA affirmatively regulates. Consider, in particular, *Ingersoll-Rand*, in which the Court struck as preempted an employee’s state law cause of action against his employer. ERISA section 510 provides, in the employee plan context, a statement of employees’ rights vis-à-vis employers; section 502 provides remedies for enforcing those rights; reading section 514(a) as a presumption for preemption, it is more than plausible to construe ERISA sections 502 and 510 broadly, as occupying the field of employees’ plan-related rights and remedies against employers to the exclusion of state law theories of recovery. Here, the *Shaw* rule of near automatic preemption and the reasoned textualist approach produce the

¹⁴⁶ California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 336 (1997) (Scalia, J., concurring).

same outcome, i.e., the preemption of employees' state law remedies against employers.

In contrast, if *Ingersoll-Rand* is analyzed with a presumption against preemption, ERISA's remedies and state law remedies can be harmonized with the latter viewed as supplementing the former. From this perspective, more accommodating to state law, the *Ingersoll-Rand* Court was wrong to declare that ERISA preempts plan-based state law actions against employers since these actions can be viewed as augmenting a base level of federal remedies.

In implicit recognition of this (or similar) logic, *Travelers* preserves *Ingersoll-Rand* by declaring in ipse dixit fashion that (notwithstanding the newly-announced presumption against ERISA preemption) state laws affecting plan remedies are still preempted under *Travelers*. However, there is no rationale for this declaration other than the Court's apparent desire to preserve case law which, examined ab initio, is incompatible with the *Travelers* predisposition against preemption.

Ingersoll-Rand thus highlights the internal inconsistency of the *Travelers* framework which, on the one hand, proclaims a presumption against preemption but which, on the other hand, declares that the *Shaw*-based case law remains in effect—even though cases like *Ingersoll-Rand* should be decided differently with a presumption against preemption, a presumption which suggests that state law remedies supplement, rather than challenge, federal law. In contrast, if section 514(a) is interpreted as a rebuttal predisposition for preemption, *Ingersoll-Rand* is correctly decided given the scope of rights and remedies established by sections 502 and 510, sections which together provide a reasonably comprehensive legal framework for employer-employee relations in the context of ERISA plans and which, viewed from a presumption for preemption, furnish an exhaustive federal statement of employees' rights vis-à-vis employers.

In reaching this conclusion under the reasoned textualist approach, section 514(a) plays a critical role as (contra *Travelers*) creating a presumption for preemption. Whether a field is occupied by a particular statute or whether there is conflict between different laws are not mechanical inquiries, but require judgments heavily influenced by the predispositions brought to them. Given a presumption that ERISA conflicts with state law or displaces it, the import of ERISA will be defined more broadly, heightening the possibility of conflict or displacement; conversely, given a predisposition to uphold state law, the ambit of ERISA

will be understood more restrictively, thus minimizing the potential clash between ERISA and state law.

When state laws affect the substance of welfare plans, the reasoned textualist approach first defines the zone of employer autonomy by examining ERISA's regulation of pension plans and by extrapolating from such regulation the subjects which, by analogy, ERISA consigns to employer autonomy (rather than regulating). This approach then determines if the challenged state law impinges upon that ERISA-created zone of employer autonomy. In this context also, the reasoned textualist vantage more comfortably preserves the results of much of the *Shaw*-based case law than does the *Travelers* framework.

Consider initially *Shaw* itself. If we apply the *Travelers* presumption against preemption, *Shaw*, which struck New York's statute mandating pregnancy-based disability benefits, was decided wrongly: there is no irreconcilable conflict when New York requires pregnancy-based disability benefits for employees, but federal law does not. Federal law, given a predisposition against preemption, can be viewed as a floor which establishes minimum protections nationally, but which does not preclude supplemental state regulation above that minimum; since federal law does not occupy the field exclusively, states are free to augment the federal floor if they want to add further rights for pregnant women. Hence, looking at the facts of *Shaw* ab initio, the presumption against preemption suggests that, contrary to the Court's actual holding in *Shaw*, section 514 does not displace New York's more demanding law requiring pregnancy-based disability payments, a law which supplements basic federal protections.

To avoid this conclusion and preserve the pre-*Travelers* case law, the *Travelers* Court decreed that state laws affecting benefit structures are preempted—without explaining why this should be so given a presumption against preemption. In effect, the *Travelers* Court says that the result in *Shaw*—preemption of the New York pregnancy disability law—will remain good law because the Court wants it to remain good law, notwithstanding the incompatibility between the Court's result in *Shaw* and the Court's new jurisprudence of ERISA preemption which presumes against the preemption found in *Shaw*.

A reasoned textualist analysis better comports with the outcome in *Shaw*: the New York statute mandating pregnancy disability benefits impinges upon the zone of employer autonomy as to the substance of welfare plans and is consequently preempted.

At first blush, section 514(a) seems to create a zone of

employer autonomy without defining the dimensions of that zone. On a second look, however, the pension provisions of ERISA provide guidance as to the contours of that zone by regulating deferred compensation plans and thereby identifying the topics which, were the statute to regulate the content of welfare plans, would be the appropriate targets of such regulation. In effect, ERISA's regulation of pension plans constitutes a blueprint for a parallel scheme of shadow regulation for welfare arrangements and thereby defines for such arrangements the areas which the statute could have but does not govern, areas thus relegated to the regime of employer determination.

Reading ERISA in this fashion, it regulates in detail pension payments, prescribing the form¹⁴⁷ and the timing of such payments.¹⁴⁸ A parallel scheme of welfare plan regulation would similarly govern the form and timing of welfare benefit distributions; that ERISA is silent on the subject of welfare plan distributions (while it addresses in detail the topic of pension plan distributions) indicates that the form and timing of welfare plan payments are consigned to the zone of employer autonomy. Hence, it is the employer's decision as to form and timing whether or not welfare plan payments will take the form of pregnancy benefits.

ERISA's specific approach to pension plan disability benefits confirms that the provision *vel non* of such benefits by welfare arrangements is committed to the employer's discretion. While ERISA mandates the timing and form of many kinds of pension benefit payments,¹⁴⁹ ERISA facilitates but does not require pension distributions on disability.¹⁵⁰ A fortiori, if pension plans (subject to detailed regulation of their distributions) can, in the employer's discretion, provide disability payments or not, welfare plans (free of all regulation of their distributions) can similarly provide disability payments or not.

Thus, extrapolating from ERISA's approach to pension distributions in general, and disability benefits in particular, the zone of employer welfare plan autonomy extends to the employer's decision to furnish or elect against disability payments and to specify covered disabilities if such payments are furnished. The New York law mandating pregnancy disability benefits

¹⁴⁷ See ERISA § 205, 88 Stat. 829, 862 (1974); I.R.C. §§ 401(a)(11), 417 (West 1999) (dealing with spousal survivorship distributions).

¹⁴⁸ See I.R.C. § 72(t) (dealing with penalties for early distributions); *id.* § 401(a)(9) (dealing with required distributions at certain ages).

¹⁴⁹ See *supra* notes 147-48 and accompanying text.

¹⁵⁰ See I.R.C. § 72(t)(2)(A)(iii) (West 1999) (suspending a 10% penalty on earlier distributions in case of employee disability).

intrudes upon the zone of employer judgment by mandating that welfare plans offer a specific form of disability benefit. Hence, the New York law is ERISA-preempted.

The analysis of *FMC* under the reasoned textualist approach is similar: in *FMC*, the employer's medical plan (an ERISA-governed welfare arrangement) defined the participant's substantive benefit as the participant's medical costs minus the participant's reimbursement from other sources; Pennsylvania's anti-subrogation statute, if applicable to welfare arrangements, would increase the dollar amount of the medical plan's benefits by forcing such plan to ignore the participant's indemnification from other sources, thus requiring the plan to defray the participant's gross (rather than net) medical expenses. While ERISA regulates pension contributions and benefits in many respects, it permits employers to set the amount of such contributions and benefits within broad statutory limits;¹⁵¹ a fortiori, ERISA's zone of employer autonomy frees employers to set the level of the welfare benefits they provide. Consequently, ERISA preempts Pennsylvania's substantive regulation of medical plan benefit levels via Pennsylvania's anti-subrogation statute.

A comparable analysis applies to the last of the *Shaw* line of cases, *Washington Board of Trade*.¹⁵² The D.C. workers' compensation statute requiring health coverage for injured employees regulates a topic which ERISA addresses in detail as to pensions, but not welfare plans, i.e., coverage. Among ERISA's most intricate provisions are those mandating which employees must participate in qualified deferred compensation arrangements;¹⁵³ in contrast, ERISA says nothing about the coverage of medical plans and other welfare arrangements. Reading section 514(a) in the context of ERISA's elaborate coverage rules for pensions, the D.C. statute tells employers something which ERISA reserves for the employer's own decision, i.e., who is covered for health benefits.

Finally, in comparison with *Travelers*, the reasoned textualist approach more satisfactorily preserves the result in *Metropolitan Life Insurance Co. v. Massachusetts*.¹⁵⁴ As I have emphasized, a

¹⁵¹ See *id.* § 415. Among its other provisions, ERISA requires that benefits and contributions be provided to rank-in-file participants on a nondiscriminatory basis. ERISA also regulates minimum funding levels for pension plans to guarantee such plans' ability to pay promised benefits. See *id.* §§ 401(a)(4), 412. However, within these boundaries, employers are free to determine the level of benefits or contributions their respective plans will provide.

¹⁵² *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992).

¹⁵³ See I.R.C. § 410 (West 1999); ERISA § 202, 88 Stat. 829, 853 (1974).

¹⁵⁴ 471 U.S. 724 (1985).

conundrum under the *Travelers* framework is what to do with the statutory exemptions for state banking, insurance, securities, and criminal laws if section 514(a) merely embodies the traditional presumption against preemption.¹⁵⁵ If, on the other hand, section 514(a) creates a predisposition for preemption, these exemptions are most naturally read as restoring in the exempted areas the traditional presumption against preemption. Under that presumption, the insurance law mandating mental health benefits for policies sold within Massachusetts is compatible with ERISA, as the Massachusetts statute merely controls the content of insurance products which ERISA plans are then free to purchase or not.¹⁵⁶

While the reasoned textualist approach better preserves much of the *Shaw* case law than does *Travelers*, this approach does not preserve all of that case law. In particular, my analysis indicates that *Mackey* and *Dedeaux* were wrongly decided.

Turning first to *Mackey*, under my approach, whether or not state garnishment laws apply to welfare plan benefits is a matter of the employer's discretionary plan design; the employer can structure welfare benefits with or without spendthrift protection. Thus, neither the *Mackey* majority (which held that welfare plan benefits are always garnishable) nor the *Mackey* minority (which held that such benefits never are) got it right: it is the employer's call.

From the reasoned textualist vantage, ERISA's silence as to the spendthrift status of welfare plan benefits is most naturally read as freeing employers to design such plans with (or without) spendthrift clauses. While ERISA section 206(d)(1) commands that pension benefits must be inalienable,¹⁵⁷ the absence of a welfare plan counterpart to section 206(d)(1) places the issue of benefit alienability in section 514(a)'s zone of employer discretion over the content of welfare arrangements; employers can, but need not, design their welfare arrangements with spendthrift clauses. State garnishment statutes are consistent with employer autonomy when employers reject spendthrift-protected welfare benefits, thereby permitting state garnishment statutes to apply to such benefits; in contrast, ERISA preempts state garnishment statutes when employers define welfare benefits as protected from

¹⁵⁵ See *infra* notes 116-17 and accompanying text.

¹⁵⁶ By the same token, the state regulation of insurance reserves, at issue in *John Hancock*, is presumptively not preempted by ERISA.

¹⁵⁷ Subject to certain exceptions such as qualified domestic relations orders. See ERISA § 206(d)(3). This section was not included in the original 1974 ERISA legislation, but was added under the Retirement Equity Act of 1984, Pub. L. No. 98-397, 99 Stat. 1426 (codified as amended in 29 U.S.C. § 1056(d)(3) (1994)).

alienation.

The *Mackey* majority thus drew the wrong conclusion from the fact ERISA mandates spendthrift protection for pension benefits but not for welfare payments; ERISA's silence on the inalienability vel non of welfare benefits does not mean that such benefits are always garnishable, but that it is the employer's substantive decision to provide welfare plans with spendthrift protection or not. If an employer's welfare plan has a spendthrift clause, that clause should be respected like the employer's other decisions about plan content and state garnishment law consequently kept at bay per section 514(a); similarly, if an employer declines spendthrift protection for its welfare plan, that is an equally valid decision about benefit design, subjecting plan benefits to garnishment and other forms of alienation.¹⁵⁸

Similarly, from the reasoned textual vantage, the rule of the *Mackey* minority—welfare benefits are never garnishable—goes too far in the opposite direction. If employers elect spendthrift protection for welfare plan benefits, section 514(a) protects that design and state garnishment laws are accordingly stayed as to such benefits; if, on the other hand, employers reject spendthrift protection for their welfare arrangements, that decision should also be respected and state garnishment statutes applied as to unprotected welfare benefits. In that case, employers' elections against spendthrift protection overcome the presumption that state garnishment laws are ERISA-preempted.

The reasoned textualist approach also indicates that the Court decided *Dedeaux* wrongly. As I discuss below,¹⁵⁹ this conclusion is particularly significant for the current controversies about ERISA, managed care organizations, the state tort liability of such organizations, and states' efforts to regulate such organizations.

In *Dedeaux*, the employee sued neither his plan nor his employer, but rather a service provider, an insurer hired to process claims for the plan and its participants. The distinction among plans, employers, and service providers is central to the text of ERISA¹⁶⁰ although the distinction was understandably ignored

¹⁵⁸ The most obvious reason employers would reject spendthrift protection is that they envision themselves as potential creditors of their employees; suppose, for example, an employee defrauds the employer and the employer seeks a civil recovery; garnishable welfare benefits may be the employer's best hope of recovery.

¹⁵⁹ See discussion *infra* notes 178-93 and accompanying text.

¹⁶⁰ Under ERISA's prohibited transactions rules, service providers must furnish their services to ERISA plans for "reasonable compensation" and cannot otherwise engage in financial transactions with such plans. See I.R.C. §§ 4975(c), 4975(d)(2), 4975(e)(2)(B) (West 1999); ERISA §§ 3(14)(B), 406(a)(1), 408(b)(2), 88 Stat. 829, 834, 879, 883 (1974). On the prohibited transactions rules generally, see Edward A. Zelinsky, *Pensions and Property Contributions: Wood, Keystone, and the Supreme Court*, 56 TAX NOTES 651, 656-

under the capacious *Shaw* test of near automatic preemption. Under that test, *Dedeaux's* action against the insurer indeed had a connection with the plan to which the insurer furnished services and was thus logically found preempted.

If, however, we pull back from the *Shaw* standard and reexamine ERISA section 502 afresh, a central feature of that procedural provision is that it grants remedies against plans, employers,¹⁶¹ and fiduciaries, but not against service providers such as the insurer hired in *Dedeaux*. Moreover, as a substantive matter, ERISA regulates in detail plans, employers, and fiduciaries but not such service providers. Hence, examined as a whole, ERISA can properly be viewed as a comprehensive scheme which, given a presumption for preemption of state law, forecloses participants' state law actions against the parties governed by ERISA, i.e., plans, employers, and fiduciaries.

In contrast, ERISA acknowledges the existence of service providers, but leaves them essentially untouched.¹⁶² While ERISA's nonregulation of service providers might suggest that service providers are, in their relationships with plans and participants, free of legal restraints (since ERISA preempts state law without providing any regulatory framework for service providers), the more compelling inference is that service providers and their relationships with plans and plan participants are supervised by state law. Service providers mark the boundary where ERISA ends and state law begins.

The inference that ERISA precludes the application of state law to service providers proves too much, indeed, effectively leaves service providers in a state of nature. Suppose, for example, that a pension plan pays an actuary for professional services which services the actuary does not perform; suppose further that the plan sues the actuary for the return of the fee. Substantively, no provision of ERISA requires professionals to perform the services for which they are paid; procedurally, no provision of section 502 enables the plan to recover its payment since section 502 provides no remedies against service providers. While we could conclude that the plan is simply out of luck, I doubt that many would embrace that conclusion.

To avoid the deduction that ERISA preempts state law

57 (1992); Edward A. Zelinsky, *Property Contributions to Qualified Plans: The DOL Threatens Established Tax Law*, 62 TAX NOTES 753, 754 (1994). Except for the provisions of the prohibited transactions rules, ERISA does not regulate service providers.

¹⁶¹ For these purposes, the regulation of employers includes the regulation of the plan administrators to whom employers may delegate their administrative obligations. See ERISA § 3(16), at 835.

¹⁶² See *supra* note 160.

remedies against the actuary, we might try, under *Shaw*, to characterize such remedies as remote, tenuous, peripheral, or run-of-the-mill to the plan and ERISA's legal framework. Ultimately, however, those formulations are, at best, of little help, at worst, are conclusory labels for desired results.

A more convincing reading of the statute is that service providers remain within the sphere of state law as ERISA only governs relations among plans, employers, participants, and fiduciaries. Dedeaux consequently overcomes the presumption for preemption by demonstrating that he is suing in state court only a service provider; substantively and procedurally, his relationship with that service provider falls outside the scope of ERISA and comes within the sphere of state law.

It is, in short, a sensible reading of ERISA from the reasoned textualist vantage to view the statute as a comprehensive (and consequently exclusive) statement of the legal relationship among plans, employers, participants, and fiduciaries. However, service providers, acknowledged but unregulated by ERISA, stand just outside the border of this regulatory scheme and remain within the sphere of state law. Dedeaux should have been permitted to proceed with his case.

C. *Reasoned Textualism, Travelers, and Boggs*

The reasoned textualist method not only better preserves much of the *Shaw*-based case law than does the *Travelers* framework, but that method more convincingly justifies the results in *Travelers* itself, i.e., the preservation of New York's scheme of hospital surcharges.

A reasoned textualist approach to *Travelers* starts by defining the employer's zone of autonomy by looking at ERISA's detailed rules on substantive pension matters, e.g., the employees who must participate in pension plans and when they must participate,¹⁶³ the requirement that plan benefits or contributions not discriminate against rank-and-file employees,¹⁶⁴ the rates at which pension benefits must accrue and vest,¹⁶⁵ certain mandatory features of plan distributions.¹⁶⁶

Notwithstanding this extensive regulation of pensions, state law may also affect the ultimate level of a participant's pension payout. If, for example, features of state corporation law enhance

¹⁶³ See I.R.C. § 410 (West 1999); ERISA §§ 201, 202, at 852, 853.

¹⁶⁴ See I.R.C. § 401(a)(4) (West 1999).

¹⁶⁵ See *id.* § 411; ERISA §§ 203, 204, at 854, 858.

¹⁶⁶ See I.R.C. §§ 401(a)(11), 401(a)(14), 401(a)(15), 417; ERISA §§ 205, 206(a)-(b), at 862, 864.

(or depress) corporate share values, the quantum of plan assets and, hence, plan benefits, will be affected by those features of state law.¹⁶⁷ Similarly, a state's minimum wage statute might reduce the profits of a corporation operating in that state with attendant impact on the value of the corporation's shares and, hence, pension plan assets. Nevertheless, even with a presumption for preemption, ERISA does not supersede such state laws under the reasoned textualist vantage as ERISA neither occupies the fields of corporate or minimum wage law nor is there any conflict between the substantive pension provisions of ERISA and such corporate and minimum wage laws.

Against this background and analogizing from it, section 514(a)'s zone of employer autonomy for welfare plans covers such matters as who participates in such plans and when, and the amount and scope of welfare plan benefits—areas which ERISA regulates for pensions but which, per section 514(a), are consigned to employer discretion in the welfare context. However, the employers' sphere of autonomy does not extend to state laws which (like corporate and minimum wage statutes) affect welfare plans economically, but which do not touch on the subjects within this protected sphere. Since, on a searching reading of ERISA, state corporate and minimum wage statutes are consistent with ERISA's regulation of pension plans, such statutes are consistent with ERISA's nonregulation of welfare plans.

New York's hospital surcharge scheme is analogous to state corporation and minimum wage laws in its effect on plans and in its compatibility with the substantive provisions of ERISA. Hence, New York can maintain its network of hospital surcharges since these surcharges, while making commercial insurance and self-funding more expensive than Blue Cross policies, do not intrude upon the zone of employer autonomy as to the substance of welfare arrangements (e.g., determining who participates in such plans and how much in benefits they receive).

In contrast, *Travelers* sustains the New York hospital surcharges by relying on two problematic notions. One of these—state laws which affect ERISA plans indirectly, but “acutely”—is particularly difficult to apply in cases like *Travelers*: while the

¹⁶⁷ If the plan is a defined contribution arrangement, the impact of state law is direct, as the participant's benefit is a function of the value of the assets in his individual account. The impact of state law upon the employee is more subtle in a defined benefit context since the employer is legally obligated to make good any shortfall between the benefits promised by the plan and plan assets. On the other hand, fewer plan assets make it more difficult to increase plan benefits. In the worst case scenario—plan insolvency—the employee covered by a defined benefit plan would look to his employer and, if applicable, the Pension Benefit Guaranty Corporation's insurance program.

Court concluded otherwise, a twenty-four percent (24%) addition to a Manhattan hospital bill will strike many as acute in its effect.

The second troubling notion in *Travelers*—the distinction between those state laws enjoying a presumption against preemption and other laws generally preempted—finds no basis in the statute which, on its face, commands a single preemption standard for “any and all state laws.”¹⁶⁸ It is, moreover, hard to reconcile *Travelers*’s proclamation of a class of state laws generally preempted by ERISA (laws affecting plan administration, benefits, and remedies) with *Travelers*’s simultaneous (and inconsistent) embrace of a presumption against preemption.

Similar observations can be made about *De Buono* and the New York State tax levied on hospitals’ gross receipts, suggesting, again, that the reasoned textualist approach more persuasively justifies the Court’s results under *Travelers* than does *Travelers* itself. The tax at issue in *De Buono* does not regulate the substance of welfare plans, e.g., who participates in such plans, what benefits such plans offer. Rather, the New York tax on hospital receipts is just that, a levy on hospitals, not a regulation of welfare plan content. Insofar as the tax is absorbed by the hospitals themselves, the tax decreases the hospitals’ value and, thus, the net worth of the welfare plans which in *De Buono* owned such hospitals. However, that tax does not intrude upon the ERISA-established zone of employer autonomy any more than do state corporation and minimum wage laws which can similarly affect the value of plan assets.¹⁶⁹

¹⁶⁸ ERISA § 514(a), at 897.

¹⁶⁹ In the third of the *Travelers* cases, *Dillingham*, the Court’s critical move is to treat the California prevailing wage statute as a minimum wage law, rather than as a regulation of the substance of apprenticeship programs. Under the *Travelers* framework, state laws affecting “benefit structures” are subject to more rigorous preemption scrutiny; in summarily rejecting that alternative, the *Dillingham* Court instead applied the presumption against preemption to the California statute, thus deciding that the statute is properly characterized as regulating wages rather than plan content. See *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316 (1997). Using the same assumption under my approach, the result is the same as the Court’s: viewing the California statute as regulating wages rather than the content of apprenticeship programs, that statute falls outside the zone of employer autonomy and is thus not preempted.

If, on the other hand, *Dillingham* is approached with a totally clean slate, my analysis and conclusion would be different: examined ab initio, the California statute strikes me as regulating the content of apprenticeship plans analogously to ERISA’s attempt to constrain the substance of pension plans through the nondiscrimination rules; just as the nondiscrimination rules are designed to increase the pension benefits and contributions of rank-and-file participants by linking their pension levels to those of management, the California statute affects the substance of apprenticeship programs by linking contractors’ ability to pay lower wages on public contracts to the satisfaction of California standards for apprenticeship programs. Under this characterization, the California statute intrudes upon the zone of employer autonomy as a regulation of the

Perhaps the best evidence of the superiority of the reasoned textualist approach is the Court's decision in *Boggs v. Boggs*¹⁷⁰ to ignore *Travelers*, indeed to ignore section 514 altogether; had the Court applied *Travelers* in *Boggs*, *Boggs* would have gone the other way.

Factually, *Boggs* presented a fairly typical situation: Isaac Boggs, a widower, remarried toward the end of his working life; he died four years into retirement; his children from Isaac's first marriage claimed an interest in his pension; Isaac's second wife, Sandra (now his widow), resisted, claiming the entire pension for herself.¹⁷¹

Two aspects of the *Boggs* situation set the stage for a showdown in the United States Supreme Court. First, the Boggs family lived in Louisiana, a community property state. Second, Dorothy Boggs, Isaac's first wife, had, when she died, left an interest in her estate to her children with Isaac.¹⁷² Hence, under Louisiana's community property laws, Isaac's children from his first marriage had a strong claim, via their mother, to part of Isaac's pension: as community property, one-half of Isaac's pension was Dorothy's; Dorothy provided that her assets were to go to her children on Isaac's death; with Isaac gone, the children were entitled to the interest in Isaac's pension which had belonged to their mother and had been left to them by her.

However, Sandra, supported by the Solicitor General, convinced a bare majority of the Court that ERISA's provisions mandating spousal survivor benefits¹⁷³ and spendthrift protection¹⁷⁴ preempt Louisiana's community property law.¹⁷⁵ From this vantage, ERISA creates for the surviving widow (Sandra) an

substance of welfare plans, i.e., the terms of apprenticeship programs; given the presumption of preemption, the statute is preempted.

Similarly, under the *Travelers* framework, the California statute is preempted if it is characterized as a regulation of plan content (rather than a minimum wage law) since, under *Travelers*, state laws affecting benefit structures are subject to greater preemption scrutiny, rather than the presumption against preemption. Thus, under either framework, mine or *Travelers*'s, the California statute is ERISA-preempted if characterized as regulating the substance of apprenticeship programs; under my approach, the statute, so characterized, intrudes on the zone of employer autonomy as to welfare plan content; under *Travelers*, the statute, so characterized, is subjected to the more stringent standard for preemption applying to laws affecting plan benefit structures.

¹⁷⁰ 520 U.S. 833 (1997).

¹⁷¹ See *id.* at 836-37.

¹⁷² In particular, Dorothy left her offspring a remainder interest in two-thirds of Dorothy's assets, such remainder interest to take effect upon Isaac's subsequent death. See *id.*

¹⁷³ See I.R.C. §§ 401(a), 417 (West 1999); ERISA § 205, at 862.

¹⁷⁴ See I.R.C. § 401(a)(13); ERISA § 206(d), at 864-65.

¹⁷⁵ See *Boggs*, 520 U.S. at 853.

overriding federal entitlement to the deceased participant's pension, an entitlement which state law cannot nullify or offset.

Under the *Travelers* framework (ignored by the *Boggs* Court), this conclusion is wrong. Starting with the *Travelers* presumption against preemption, ERISA's spousal annuity and spendthrift provisions can be harmonized with Louisiana community property law, leaving the state law intact. As Justice Breyer noted in his *Boggs* dissent,¹⁷⁶ Isaac's pension could, per federal law, be payable to Sandra as his surviving widow while Louisiana, as a matter of local property law, could award other assets of Isaac's estate to his children to compensate them for the pension interest which, under community property law, is theirs but which, under ERISA, is payable to their father's widow.¹⁷⁷

In contrast, the reasoned textualist approach justifies the majority outcome in *Boggs* under the rubric of section 514, i.e., Sandra receives Isaac's pension free of the children's community property claims and of the need for any compensating offset to the children from the rest of Isaac's assets. Starting with a presumption for preemption per section 514, the import of ERISA's spousal protection provisions can be understood more (rather than less) broadly, as conferring upon Isaac's widow an entitlement to his pension under a federal form of community property law which the state cannot offset through the allocation of other items in Isaac's estate. Under the reasoned textualist approach, section 514 is not (as it was for the *Boggs* majority) a problem to be ignored, but rather, construed as a presumption for preemption, is a more convincing explanation for the majority's conclusion.

Boggs is a close case—as witnessed by the Court's 5-4 split—but those are the cases where a presumption makes a difference. The *Boggs* majority reached its result only by disregarding the *Travelers* presumption against preemption and by ignoring section 514. In contrast, the reasoned textualist approach, which adds to Sandra's side the weight of a statutory predisposition for preemption, justifies the *Boggs* outcome and its more expansive understanding of ERISA's spousal protection provisions as a form of superseding federal community property law in plan benefits which the states are forbidden to nullify or offset.

¹⁷⁶ See *id.* at 855 (Breyer, J., dissenting).

¹⁷⁷ Moreover, *Boggs* does not fall within any of the categories *Travelers* designates for more exacting ERISA preemption scrutiny, i.e., state laws affecting plan benefit structures, plan administration, and remedies.

D. HMO Tort Liability and the Regulation of Managed Care

The issues which have recently made ERISA preemption a politically contentious matter are the issues of tort liability in the managed care context and the state regulation of managed care organizations.

In the tort setting, much popular and scholarly attention has focused upon the processes by which managed care arrangements prescreen proposed medical procedures and the cases in which such managed care utilization review processes arguably miscarry.¹⁷⁸ The typical case involves an employee covered by his employer's medical plan whose physician prescribes a particular course of treatment; under the employer's plan, this prescribed regimen is reviewed by an entity hired for that purpose, an insurance company or other managed care firm to which the employer has contracted the administration of the plan. The reported cases invariably entail tragic circumstances, e.g., a cancer patient denied treatment who later dies.¹⁷⁹ If the denial of treatment was wrongful and caused the patient's injury, the inquiry then becomes what, if any, remedies are available.¹⁸⁰

ERISA section 502, in these cases, provides only for "recover[y of] benefits due" under the plan.¹⁸¹ While in many instances the recovery of previously-denied benefits constitutes full and fair compensation (e.g., the restoration of a pension participant's disallowed retirement payments), in a managed care utilization review case, it is often too late for the restoration of plan benefits to constitute a meaningful recovery; the employee, as a result of the deprivation of medical care, has frequently suffered medically irreversible harm, indeed has often died. What, then, about possible remedies under state law tort theories?

Dedeaux, as decided per the *Shaw* test of near automatic preemption, counsels that ERISA preempts any state law remedy

¹⁷⁸ See, e.g., Amy F. Khen, Comment, *Are We Protected from HMO Negligence? An Examination of Ohio Law, ERISA Preemption, and Legislative Initiatives*, 30 AKRON L. REV. 501 (1997).

¹⁷⁹ See, e.g., *Parrino v. FHP, Inc.*, 146 F.3d 699 (9th Cir. 1998) (holding that ERISA preempts claims based upon denial of therapy to participant who died from brain tumor); *Benoit v. W.W. Granger, Inc.*, 22 Employee Benefits Cas. (BNA) 2034 (E.D. La. 1998) (holding that ERISA preempts claims based upon denial of immediate surgery to accident victim).

¹⁸⁰ Note that, in the managed care context, the conclusion that treatment is unnecessary or unauthorized denies such treatment since prior approval is required for treatment to proceed. In contrast, under fee-for-service medicine and traditional medical insurance, the insurer's disapproval comes after the service has been performed. Hence, in the traditional setting, the consequence of disapproval is not denial of treatment, but denial of payment.

¹⁸¹ ERISA § 502(a)(1)(B), 88 Stat. 829, 891 (1974).

against an insurer or other company performing utilization review for the employer's managed care plan. Such a remedy, under *Shaw* and *Dedeaux*, has a connection with an ERISA-covered arrangement, i.e., the employer's medical plan for which the review was done; hence, no state law cause of action lies for faulty decisions made in the utilization review process.

The reasoned textualist approach, in contrast, indicates that, under a more searching reading of the statute, ERISA does not preempt state law remedies when a plan participant sues a service provider (since service providers fall outside the ambit of section 502) and that *Dedeaux* was thus wrongly decided (since *Dedeaux*'s lawsuit against the insurer was aimed at a service provider rather than the plan or the employer).¹⁸² In the utilization review context, the critical difference between the *Shaw/Dedeaux* approach of near automatic preemption¹⁸³ and the reasoned textualist approach is that the former focuses upon the nature of the injured plaintiff's claim (Does such claim have a connection with an ERISA plan?), while the latter focuses upon the identity of the defendant. When employees sue service providers (as opposed to plans, employers, and fiduciaries) under state tort theories, I conclude, ERISA does not preempt (even with the presumption for preemption) since, as a textual matter, no provision of ERISA regulates the relationship between employees and service providers. There is, in this context, no conflict between state tort remedies and ERISA nor does ERISA occupy the field since ERISA section 502 says nothing about service providers.

What if the employer's plan performs utilization review in-house rather than contracting that function to an outside service provider?¹⁸⁴ Under the reasoned textualist approach, ERISA preempts state tort law remedies against plans since section 502, given a presumption for preemption, provides the exclusive set of remedies vis-à-vis such plans. Under this analysis, a dichotomy emerges between plans which perform utilization review functions internally (not liable under state law for mistakes because ERISA

¹⁸² See discussion of *Dedeaux* under the reasoned textualist approach, *supra* notes 159-62 and accompanying text.

¹⁸³ Insofar as *Travelers* indicates that greater preemption continues for state laws affecting plan participants' remedies, *Travelers* points in the same direction as *Shaw* and *Dedeaux*, i.e., the ERISA preemption of state tort law.

¹⁸⁴ An aggressive reading of the statute might embrace a "dual function" analysis: while the plan as such cannot be sued under a state law theory because plans are covered comprehensively by ERISA section 502, the plan, when it steps into the role of being its own service provider, is, in that latter capacity, liable under state law since service providers fall outside the ambit of section 502. On balance, however, I think this approach pushes the text of the statute too far, blurring unacceptably the statutory distinction between service providers and the plans they service.

sections 502 and 514 preempt state law remedies vis-à-vis plans) and plans which contract for managed care services (the outside service provider being subject to state law theories of recovery since service providers, unlike plans themselves, fall outside the scope of section 502). To those who would object to this distinction, the short answer is that it is found in the statute—which distinguishes between plans and service providers—and that Congress can change the statute if it desires.

The longer answer is that Congress, when it passed ERISA in 1974, could not have foreseen the way medicine in general, and employer-provided medicine in particular, would be organized in 1999. Conceivably (but by no means invariably), Congress would have fashioned parts of ERISA differently had it been able to divine the configuration of medicine a generation later.

The issue now is what institution of government, if any, should revise today the policies embodied in ERISA. In respecting the terms of the statute, including the distinction between plans, which are covered by section 502, and service providers, which are not, textualism, as is frequently the case, becomes a statement of institutional competence. I will address this issue more generally in a moment.¹⁸⁵ For now, I would simply observe that Congress and the Executive branch are well aware of ERISA preemption,¹⁸⁶ there is simply no political consensus to amend the statute.¹⁸⁷

My analysis of state laws regulating managed care entities is

¹⁸⁵ See discussion *infra* notes 195-200 and accompanying text.

¹⁸⁶ See, e.g., S. 1890, 105th Cong. § 302 (1998); H.R. 3605, 105th Cong. § 302 (1998); S. 1499, 105th Cong. § 202(b) (1997); H.R. 2967, 105th Cong. § 202(b) (1997).

¹⁸⁷ In the text, I explore the issue of state tort liability for utilization review decisions since these decisions have received much scholarly and judicial attention. However, my analysis applies to more traditional malpractice claims as well. Suppose, for example, that an employee covered by his employer's medical plan requires surgery and that the surgeon, engaged pursuant to a managed care arrangement, commits malpractice. *Shaw* and *Dedeaux* indicate that the employee has no state tort law claim against the surgeon (since he rendered medical care in connection with the employer's medical plan) and that the employee has no ERISA-based claim, either (since section 502 does not authorize malpractice actions).

To avoid this conclusion, the courts might label the employee's state law malpractice claim as having only a "remote," "tenuous," or "peripheral" link to the plan, or as the kind of "run-of-the-mill" state law actions ERISA does not preempt. However, as I have suggested, these labels are at best conclusory, at worst misleading.

The reasoned textualist approach, in contrast, indicates that ERISA does not preempt whatever state law remedies the employee might possess against the physician and the managed care organization since these service providers fall outside the coverage of section 502. On the other hand, section 502, as a comprehensive statement of remedies against employers and plans, preempts the employee's state law claims against his employer and its plan.

similar. Such legislation takes many forms,¹⁸⁸ including states' substantive mandates that providers furnish particular services to their patients, procedural requirements for utilization review decisions, and "any willing provider" statutes which require managed care organizations to pay any medical provider (e.g., any doctor) for furnished services as long as such provider meets the organizations' terms and conditions.¹⁸⁹

Under *Shaw* and *Massachusetts Life*, ERISA preempts this kind of regulatory legislation when it applies to managed care entities hired by employers' medical plans. Such legislation is indistinguishable from the Massachusetts insurance statute deemed to "relate to" ERISA plans by constricting employers' choices: just as the Massachusetts statute denied employers the option of insuring their medical plans without paying for mental health benefits, state laws regulating managed care organizations preclude employers from contracting with such organizations unless the employers accept the full panoply of state-mandated rules imposed upon such organizations. While the Massachusetts statute was ultimately saved from preemption by section 514's insurance exemption, no such exemption protects from ERISA preemption state laws regulating managed care entities.

In contrast, under the reasoned textualist approach,¹⁹⁰ state statutes governing managed care organizations, notwithstanding the presumption for preemption, are compatible with ERISA because such statutes do not intrude upon the zone of employer autonomy defined by reference to ERISA's regulation of pensions,¹⁹¹ a zone extending and limited to such topics as who is covered for welfare plan benefits and the amounts and forms of such benefits. State statutes regulating managed care entities constrict the choices of service providers, but do not require plans or employers to use such service providers.

In this setting, we again see the divergence under the reasoned textualist approach between service providers (subject to state regulation since ERISA does not govern such providers) and plans furnishing their own services in-house (immune from state

¹⁸⁸ See, e.g., Ellen Perlman, *Taming the Managed Care Beast*, GOVERNING, May 1998, at 28.

¹⁸⁹ Compare *Washington Physicians Serv. Ass'n v. Gregoire*, 147 F.3d 1039 (9th Cir. 1998) (holding Washington's Alternative Provider Statute is not ERISA-preempted), with *Prudential Ins. Co. v. National Park Med. Ctr.*, 154 F.3d 812 (8th Cir. 1998) (holding Arkansas's Patient Protection Act, including its "Any Willing Provider" provision, is ERISA-preempted).

¹⁹⁰ The same is also true under *Travelers*: state laws regulating managed care entities are similar to the New York hospital surcharges upheld in *Travelers*.

¹⁹¹ See discussion *supra* notes 148-53 and accompanying text.

regulation since ERISA preempts state laws intruding upon plans' zone of autonomy). And, again, the appropriate response to this divergence is that it is embodied in the statute and can be changed by Congress if the political will exists.¹⁹²

Finally, consider the proposed preemption provisions of the Dingell-Norwood legislation, passed by the House of Representatives as this Article goes to publication. The conventional understanding of Dingell-Norwood is that, if enacted into law, it would restrict the reach of ERISA preemption and would correspondingly broaden the tort liabilities of HMOs and other managed care organizations. If *Shaw* and *Dedeaux* remain good law, the Dingell-Norwood provisions, if incorporated into section 514, would indeed expand the liabilities of managed care entities.

On the other hand, under the reasoned textualist approach to section 514 and ERISA preemption, the Dingell-Norwood provisions are largely superfluous since, from the reasoned textualist vantage, managed care organizations, as service providers outside ERISA's regulatory scheme, are already subject to state law tort obligations. Indeed, under the reasoned textualist construction of section 514, Dingell-Norwood, if enacted into law, would actually reduce the state law tort liabilities of health care providers by imposing upon plaintiffs a general requirement that they exhaust their administrative remedies,¹⁹³ a requirement which some (perhaps many, maybe all) states, left to their own devices, would not impose.

V. REASONED TEXTUALISM AND ERISA PREEMPTION IN CONTEXT

In this section, I place my discussion of ERISA preemption in several contexts. By doing so, I hope to confirm the case for the reasoned textualist approach to ERISA preemption. I also hope that my analysis of ERISA preemption, besides benefiting from the insights to be derived in these settings, will contribute some insight as well.

A. *Implied Versus Express Preemption*

The courts and commentators typically think of preemption in dichotomous terms, as either express or implied: when a federal statute contains an explicit statement about that statute's preemptive effect, the courts' task is the implementation of that

¹⁹² Indeed, I argue for such change *infra* Part V.E.

¹⁹³ See H.R. 2990, 106th Cong. § 1302(a) (1999) (adding to ERISA section 514(f)(3)).

statement; when a federal statute lacks an express provision delineating the statute's preemptive scope, the preemption inquiry determines whether, by implication, the statute conflicts with state law or so occupies the field as to preclude simultaneous state regulation.

As a declaration of broad principles, these are useful generalizations. The saga of ERISA preemption, however, indicates the limits of these generalizations. ERISA preemption is best understood as a hybrid, partaking of both express and implied preemption. Section 514 is obviously an explicit statutory statement on the subject of ERISA's preemptive effect; just as obviously, the critical terminology of section 514 ("relate to"), standing alone, is enigmatic. The reasoned textualist insight is that the terminology of section 514 can be made workable if it is read in three contexts: the rest of ERISA, the conventions of implied preemption doctrine (i.e., field and conflict preemption), and a standard implement from the lawyer's toolkit (i.e., presumption).

What emerges—section 514(a) as a presumption that provisions of ERISA conflict with state law or occupy the field so as to exclude state law—does not fit comfortably in either the preemption box labeled "express" or the box labeled "implied." However, such a reading of section 514 gives meaning to the text as a statement to preempt more expansively than normally while avoiding the troubling territory where section 514 becomes the Godzilla of preemption, crushing everything in its path.

Consider, again, in this context *Dedeaux* and *Boggs*. In *Dedeaux*, the Court, after examining section 514(a), placed it aside to examine independently the implied preemptive effect of section 502; in *Boggs*, the Court ignored section 514(a) altogether. From a textualist perspective, both of these cases are troubling: section 514 is in the statute. It is one thing to resort to implied preemption when a statute is silent as to its preemptive effect; it is another to use implied preemption doctrine as a means of ignoring a difficult, but express, preemption provision.

On the other hand, section 514(a) as an express preemption statute is, as the Court has repeatedly noted, not a model of draftsmanship. The only way to reconcile the conflicting imperatives—to give content to the text of section 514(a) while reaching reasonable results—is to breach the dichotomy between express and implied preemption, to read section 514(a) as a statutory command to presume preemption by reading broadly the import of ERISA's other provisions and, with that presumption, to ask the standard questions of implied preemption doctrine, i.e., whether ERISA conflicts with the challenged state law or occupies

the field to the exclusion of state law. In short, despite its value in other settings, in the context of section 514, a sharp distinction between express and implied preemption proves unhelpful since only by taking elements from both categories can section 514 be respected as statutory text while producing reasonable outcomes.

B. *Path Dependency*

I suspect that the Court might have arrived at this or a similar analysis had the ERISA preemption cases come before the Court in a different order than they did. Thus, a second lesson of the saga of ERISA preemption is that legal doctrine can indeed be path dependent.¹⁹⁴

In an important sense, the Court's expansive reading of section 514 in *Shaw* and *Massachusetts Life* made no practical difference in those cases. Federal law had, for years subsequent to those at issue in *Shaw*, banned discrimination on the basis of pregnancy; consequently, in striking New York's law protecting pregnant employees, the Court was denying such protection only for years which had already passed, not for the future when the new federal statute applies. Similarly, in *Massachusetts Life*, the Court's expansive reading of section 514(a)'s "relate to" terminology made no ultimate difference since, at the second stage of the section 514 inquiry, the Massachusetts law survived as an exempted insurance regulation. In these cases, the practical implications of the *Shaw* standard looked, if not benign, at least manageable. Then, by the time of *Dedeaux*, *Shaw* and *Massachusetts Life* had committed the Court to an expansive reading of section 514 even though the implications in *Dedeaux* were more troubling, i.e., denying Mr. Dedeaux his remedy.

It is interesting to speculate as to the Court's course had *Dedeaux* come first. Perhaps *Dedeaux* would then have been the occasion for articulating initially the expansive understanding of section 514's "relate to" terminology actually announced in *Shaw*; in this case, the Court's interpretation of ERISA preemption as nearly automatic would have unfolded as it in fact did. On the other hand, it is possible that *Dedeaux*, decided before there was a *Shaw*, might have given the Court greater pause and led to a narrower formulation of the reach of ERISA preemption.

To stretch the hypotheticals further, suppose that *Travelers* had been the first ERISA preemption case to reach the Court. It is, again, possible that, approaching ERISA preemption afresh, the

¹⁹⁴ On path dependency, see Charles M. Yablon, *Judicial Drag: An Essay on Wigs, Robes and Legal Change*, 1995 WIS. L. REV. 1129.

Court would have formulated in this hypothetical *Travelers* case the same expansive reading of section 514 embraced in *Shaw*. But it is also possible that, confronted with the facts of *Travelers* instead of the facts of *Shaw*, the Court would have declined to strike New York's hospital surcharge scheme—as indeed the Court later did. The result would have been ab initio a more restrained reading of ERISA's preemptive scope.

C. *Varieties of Textualism*

The story of ERISA preemption also highlights the variety of approaches which, in current legal parlance, are labeled as "textualist."¹⁹⁵ The mechanical, dictionary-based textualism underlying *Shaw* has been widely condemned by commentators, and deservedly so; confronted with a statute as enigmatic as section 514, a court will not find viable guidance in Webster's; a dictionary is not a substitute for judgment or for the searching reading of a difficult text.

It is, however, equally troubling to respond to a trying statute by abandoning it. As is clear from the voluminous contemporary literature on the subject,¹⁹⁶ when difficult statutes are ignored, important values are ignored with them, most notably, respect for the legislative process and for politically accountable decisionmaking.¹⁹⁷

What I have labeled "reasoned" textualism is thus an attitude which, in the face of a statute like ERISA, defines the judicial task as giving a workable construction to the statute, as opposed to declaring the statute hopeless and imposing the judiciary's own policy preferences. The resulting engagement with the statutory text will consider, inter alia, the practical effects of different possible interpretations. However, the hallmark of this approach is the recognition that, in a world of myriad policy choices, the judicial decisionmaker should defer to the choice which emerges

¹⁹⁵ It is an understatement to say that the scholarly literature on textualism has become voluminous. See John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501 (1997); Edward A. Zelinsky, *Text, Purpose, Capacity and Albertson's: A Response to Professor Geier*, 2 FLA. TAX REV. 717 (1996); see, e.g., *A Symposium on Legal and Political Hermeneutics*, 16 CARDOZO L. REV. 1883 (1995).

¹⁹⁶ See, e.g., Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL'Y 541, 563-69 (1998).

¹⁹⁷ Note that disregard of an enigmatic text like section 514 does not flout another textualist value, i.e., predictability. When courts spurn reasonably clear statutory language, the statute ceases to be a reliable guide as to what the law is, making the law less predictable since the statute and the case law point in different directions. However, difficult texts like section 514, by their nature, do not provide readily discernible guidance to the reader; thus, ignoring such texts does not reduce the predictability of the law—even though ignoring such texts reflects diminished respect for the legislative process.

from the effort to make the statute workable.

An increasingly common critique is that judges who claim to be textualists are sub silentio imposing their own policy preferences in the guise of deference to statutory terminology; when push comes to shove, it is argued, these putative textualists pursue their personal policy predilections rather than the discipline of text-based judging.¹⁹⁸

At one level, we should not be surprised that judges have conflicting values and that a judge who can, with equanimity, defer to legislative policies in many (perhaps most) instances will, in other settings, feel so strongly about a particular outcome that his commitment to textualism is placed aside. Judges are human. At another level, the charge that a particular judge uses textualism (or any other method) inconsistently is, in the final analysis, a critique of the judge, not the method.

However, the story of ERISA preemption suggests that the approach today called textualism is more compelling for some texts than for others; consequently, a judge could, in principled fashion, define his task in the ERISA setting as making the statute workable, deferring to the policies which emerge from a searching reading of the statute, while, in other contexts, viewing the relevant text as less constraining.

ERISA (like the Internal Revenue Code¹⁹⁹) is the kind of statute which presents a strong case for reasoned textualism: intricate, technical, frequently revisited by Congress. Whether one conceives of ERISA as a complex balance of technical and policy considerations, the complicated accommodation of conflicting interests, or a combination of the two,²⁰⁰ Congress is the appropriate forum for any adjustments or changes. But one size need not fit all. That a judge properly defines his task in an ERISA case as finding a sensible and coherent reading of this detailed and textually complex statute tells us nothing about the appropriate approach to the Equal Protection Clause.

D. *The Illusiveness of Legislative Intent*

Perhaps the strongest argument for the values underlying what we today call textualism is the frequent insistence of its

¹⁹⁸ The frequently cited exemplar of the judge who consistently placed aside his personal policy preferences is Benjamin N. Cardozo. See generally ANDREW L. KAUFMAN, *CARDOZO* (1998). It is interesting to speculate about the linkage between contemporary interest in Justice Cardozo and current interest in textualism.

¹⁹⁹ Indeed, much of ERISA is part of the Internal Revenue Code. See *supra* note 11.

²⁰⁰ My own assessment is that it makes the most sense to view ERISA as combining complicated policy decisions with equally complex accommodations of varied interest groups.

opponents that, in cases like ERISA preemption, they advocate, not judicial displacement of legislative pronouncements, but a purer implementation of legislative intent. In disregarding statutory text, it is argued, the judge is not usurping the legislative function, but is implementing the underlying legislative program.

Whatever its merit in other settings,²⁰¹ in the context of ERISA, statements of legislative intent are typically so general as to be useless, e.g., ERISA was intended to help employees. As I hope is clear to the reader,²⁰² ERISA is a complex and, in many respects, contradictory statute. It regulates some aspects of employee plans in excruciating detail;²⁰³ it leaves other aspects totally untouched.²⁰⁴ Many provisions of ERISA evince a profound paternalism;²⁰⁵ others reflect the assumption that a properly informed employee can fend for himself;²⁰⁶ yet other provisions of ERISA appear to be concessions to employer interests.²⁰⁷

While I do not doubt the sincerity of those who discern in all of this an overriding legislative intent, I confess my skepticism. I do, however, find it significant that these commentators often feel compelled to justify their disregard of statutory text by resort to notions of legislative intent. In one sense, we are all textualists or, perhaps more accurately, we all accept—at least nominally—the norms (deference to politically-accountable, legislative decisionmaking) underlying textualism.

E. *The Case for Repealing Section 514*

My analysis suggests a final question: Should section 514 remain on the books? I conclude that it should not; Congress should repeal section 514 and let the default rule—the Court's normal jurisprudence of implied preemption—determine the scope of ERISA preemption.²⁰⁸

²⁰¹ And I am a skeptic. See Zelinsky, *supra* note 195.

²⁰² See Brauch, *supra* note 196, at 547 ("The policy choices Congress made in creating [ERISA] . . . reflect a complex balancing of competing interests.").

²⁰³ For example, ERISA's elaborate regulation of vesting. See I.R.C. § 411(a) (West 1999); ERISA § 203, 88 Stat. 829, 854 (1974).

²⁰⁴ Such as the employer's decision to provide pension disability benefits *vel non*. See *infra* notes 149-50 and accompanying text.

²⁰⁵ Most obviously, ERISA's coverage rules require employers to include eligible employees within qualified plans—whether or not the employees want to be covered. See I.R.C. § 410; ERISA § 202, at 853.

²⁰⁶ Important provisions of ERISA assure employees access to information on the apparent assumption that, once informed, employees can protect their own interests. See ERISA §§ 101-107, at 840-50; *id.* § 502(c), at 891-92.

²⁰⁷ Most obviously, the level of benefits promised by a pension plan is largely within the employer's determination—as indeed is the decision whether to have a plan at all.

²⁰⁸ In contrast, others conclude that section 514 should be amended. See, e.g., Robert

As a substantive matter, this conclusion reflects my disenchantment with the policies most naturally read in section 514: a presumption for preemption, a zone of employer autonomy as to the content of welfare plans.²⁰⁹ Procedurally, my conclusion that Congress should repeal section 514 reflects the relative institutional competence of Congress and the courts.

ERISA is both a detail resolution of myriad technical issues and a complex balancing of contending interests. Only Congress, supported by professional staff and acting through specialized committees, can pronounce the kind of rules necessary to address these issues and balance these interests. In contrast, preemption is a matter of interstitial adjustment once substantive policy has been formulated legislatively, involving the kind of case-by-case determinations best consigned to the courts.

As long as Congress has allocated to itself primary responsibility for ERISA preemption policy, the courts should define their role as making that policy as workable as possible. Congress would, however, be well-advised to delegate to the courts a larger role by abolishing section 514 and thereby letting the judiciary, case-by-case, resolve the compatibility of particular provisions of ERISA and particular state laws.

The repeal of section 514—and the consequent resolution of ERISA preemption cases under the Court's normal standards—would make a practical difference in two kinds of controversies: close cases and cases involving the substance of welfare plans.

As to the former, let us return one last time to *Boggs*. Either of the possible characterizations of the relationship between ERISA and Louisiana's community property law is plausible: ERISA can reasonably be understood as awarding the surviving spouse the pension death benefit as such, but as also permitting the state to make an offsetting reduction of the community property to which the spouse would otherwise be entitled. Alternatively, as the narrow *Boggs* majority held, ERISA can be construed as bestowing upon the surviving spouse an interest in the deceased mate's pension which cannot be counterbalanced by the state's allocation of the rest of the estate.

While the *Boggs* Court ignored section 514(a), the most

N. Covington, *Amending ERISA's Preemption Scheme*, 8 KAN. J.L. & PUB. POL'Y 1 (1999); Julie K. Locke, *The ERISA Amendment: A Prescription to Sue MCOs for Wrongful Treatment Decisions*, 83 MINN. L. REV. 1027 (1999); Julie K. Freeman, Comment, *ERISA Preemption of Medical Malpractice Claims Against Managed Care Organizations*, 36 DUQ. L. REV. 863, 885 (1998) ("The most expeditious and lucid remedy would be for Congress to amend ERISA to clearly provide that the medical malpractice of managed care organizations will not be shielded by ERISA.").

²⁰⁹ See discussion *supra* notes 145-46 and accompanying text.

workable construction of that provision in a situation like *Boggs* is as tie-breaker, a canon of construction presuming preemption and thus indicating that close cases should be resolved in favor of preemption. On that understanding of the statute, section 514's repeal would place ERISA under the rubric of the Court's traditional implied preemption doctrine which presumes against preemption. On that alternative understanding, the *Boggs* minority position, upholding Louisiana's community property law, would become the law.

As to welfare plans, the repeal of section 514 would permit the states to regulate the substance of such plans. Under all of the possible understandings of section 514—*Shaw*, *Travelers*, reasoned textualism²¹⁰—section 514 precludes the states from regulating the content of welfare arrangements; repeal of section 514 would invite such state regulation since there is no federal legislation which occupies the field or which would conflict with state statutes. In practical terms, upon the repeal of section 514, the states could pursue vis-à-vis employer-provided health plans the gamut of possible policies, ranging from employer autonomy to extensive forms of public regulation.

The case for repealing section 514 thus ultimately becomes the argument for state experimentation and variation. Since others have articulated this case so well,²¹¹ I limit myself here to three observations. First, while the cumulative nature of pension entitlements justifies national pension standards in a world of employee mobility, the more discrete, annual character of welfare plan benefits (in particular, medical arrangements) makes such benefits more amenable to state-by-state regulation. Second, the repeal of section 514 would have little impact in those areas where ERISA affirmatively regulates since ERISA, when it does regulate, generally does so exhaustively and thus preemptively. Third, the case for abolishing section 514 is reinforced by the increasingly problematic nature of the distinction between insured and self-insured plans.

Pension interests are by their nature cumulative over an employee's career; an employee sent by his employer from State A to State B takes his pension entitlement with him; were States A and B to promulgate conflicting regulatory schemes as to that

²¹⁰ *Shaw* displaces state laws affecting the substance of welfare plans by virtue of *Shaw*'s capacious test of near automatic preemption. *Travelers* preempts state laws touching upon the content of welfare arrangements because *Travelers* says it does. The reasoned textualist approach preempts state laws impacting upon the substance of welfare plans by reading section 514(a) as declaring a zone of employer autonomy as to such substance.

²¹¹ See Mashaw & Marmor, *supra* note 117.

continuing entitlement, the two schemes would need to be reconciled, a task which would not always be easy.

Assume, for example, that, in a world where states regulate pension vesting, State *A* vests all pension benefits after three years of employment, State *B* vests after ten years, and an employee moves from *A* to *B* after four years of employment. The employee in this example was vested in State *A* having met that state's three year requirement. Is he still vested when the employee relocates to State *B* with a longer vesting period he has yet to satisfy?

One can imagine several possible rules to resolve the conflict between State *A*'s more liberal vesting standard and State *B*'s more stringent criterion, e.g., the employee remains vested as to benefits earned in State *A*, but is not yet vested as to benefits subsequently accrued in State *B*; the employee becomes nonvested as to all his benefits upon his move to State *B* with its longer vesting requirements; having earned nonfeitable benefits in State *A* under its more rapid vesting schedule, the employee is allowed to use that vesting schedule now that he resides in *B*, even as to benefits earned in *B*. This plethora of possibilities and the likelihood (perhaps inevitability) that the various states will adopt conflicting approaches suggests the desirability of a single, nationwide vesting standard—as indeed ERISA provides.

Consider, in contrast, medical benefits and the annual, rather than cumulative, nature of such benefits. Suppose, for example, that State *A* mandates that employer plans must provide psychological counseling services but that State *B* does not. If his employer provides only the legally-required minimum in each state, our hypothetical employee loses prospectively his entitlement to such psychological services when he relocates from *A* to *B* where such services are not part of the local minimum. However, there is no retrospective implication to that loss of coverage; no one would suggest that the employee must repay the amounts for counseling he received while covered by State *A*'s mandate; State *B*'s rule would just affect the employee going forward, denying him future counseling services as a new resident of State *B*.

In short, the employee's relocation from State *A* to State *B* is far simpler as to medical benefits, which can more easily be governed by different states' rules on a year-by-year basis, than as to pension interests which, because of their cumulative nature, raise more difficult problems about retroactive effects and conflicting legal regimes.

Second, the repeal of section 514 would have minimal impact in those fields where ERISA affirmatively regulates since ERISA,

when it does regulate, usually²¹² does so exhaustively and thus preemptively. Hence, as to many provisions of ERISA, the repeal of section 514 would not matter as these provisions are so extensive that, even with the Court's traditional presumption against implied preemption, state law would conflict or be squeezed out of an occupied field. If, for example, section 514 were repealed and a state enacted its own vesting requirements for pensions, ERISA's detailed vesting provisions would preempt such state requirements—even if there were no section 514 and the matter were decided under the Court's normal implied preemption standards.

Third, the case for repealing section 514 is reinforced by the increasingly problematic nature of the distinction between insured and self-insured plans, an important (but increasingly unworkable) feature of section 514 which, via its insurance exemption, postulates a reasonably clear boundary between insured and noninsured arrangements. Consider, for example, the emergence of "stop-loss" policies under which the employer is responsible for its employees' medical expenses to a specified threshold with the insurer liable for amounts in excess of the threshold. Presumably, a state, as a permissible regulation of insurance, can specify features of the stop-loss contract issued by the insurer to the plan. Can such regulation affect the self-funded features of the plan? Can, for example, a state, to insure the solvency of carriers issuing stop-loss policies, limit the purchase of such policies to plans with prescribed cost controls as to benefits below the stop-loss threshold? If so, the state's regulation of insurance effectively extends to the self-funded features of plans purchasing stop-loss insurance, in practice blurring the distinction between the state's jurisdiction over insurance and its nominal lack of authority over the noninsured features of welfare plans. If, on the other hand, a state cannot regulate the facets of the employer-funded portion of the arrangement likely to cause employers to trigger the stop-loss coverage, the state's regulation of insurance is severely limited as to the traditional function of mandating carrier solvency.²¹³

Either way, section 514's distinction between state insurance laws, exempted from more stringent preemption standards, and the noninsured aspects of welfare plans, immune from state

²¹² But not always. Thus, for example, I argued earlier that, given a presumption against preemption, section 502, ERISA's remedy provision, can be viewed as a floor of basic protections which the states can supplement. See discussion *supra* Part IV.B.

²¹³ See, e.g., *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 712, 723 (2d Cir. 1993) (holding that ERISA preempts New York Department of Insurance Actuarial Information Letter No. 5 pertaining to stop-loss policies).

insurance regulation and thus subject to more exacting preemption scrutiny, proves in 1999 to be far more problematic than it was in 1974.

Or consider the now-common practice by which insurers set premiums for particular employers based on the employer's own claims experience in the preceding year. At one level, policies issued in this fashion look like traditional insurance since the insurer assumes the risk that the quoted premium (based on the prior year's outlays) will cover claims for the current year. On the other hand, in this context, there is, for the long run, no pooling of risk between different employers; over time, each employer is in effect its own risk pool with its premiums set to cover its outlays. In an important sense, the employer in this setting is self-funding over time since its premiums reflect its own anticipated experience based on the employer's own past experience.

Formalistically, it is sensible to view policies issued in this fashion as insurance subject to state regulation as such. However, as a matter of substance, the employer can, with minimal economic impact,²¹⁴ avoid that regulation by declaring that it will henceforth self-insure with the carrier hired as plan administrator of the new self-insured plan. This suggests, again, that section 514's distinction between insurance and non-insurance regulation is today too permeable to be useful.

My conclusion that Congress should repeal section 514 stands even if the Court embraces the reasoned textualist approach I recommend; that approach is the best means of making section 514 workable; however, the limitations of even that approach suggest the rescission of section 514 as the ultimate course in this area.

This conclusion is prompted, in particular, by my reading of ERISA as permitting state tort actions against service providers hired by plans, but not against plans themselves.²¹⁵ That reading is a faithful construction of the text and a significant improvement over the current jurisprudence of ERISA preemption which, per *Dedeaux* and *Shaw*, precludes all tort actions against plans and providers alike.

²¹⁴ In the short run, this impact would occur in a year when the employer's workforce claimed unpredictably large medical benefits. A self-insured employer would (absent stop loss coverage) be responsible for all of such benefits; under a "traditional" insurance policy, with premiums reflecting the employer's prior experience, the unexpected benefit obligation for the current year would instead be the insurer's responsibility. In the long run, however, the employer would absorb the costs of these unanticipated benefits even under "traditional" arrangements since the employer's premium for future years will be increased to reflect the previously unpredicted (but now known) level of benefits for its workforce.

²¹⁵ See discussion *supra* notes 178-84 and accompanying text.

However, the statute's distinction between service providers (subject to state law liability for their mistakes) and plans which perform all functions in-house (not subject to state tort law because such plans are covered exclusively by ERISA section 502) lacks, as a matter of policy, any compelling justification in the era of managed care. Moreover, the distinction creates an artificial incentive for plans to provide services in-house to avoid the cost of tort liability even when third parties can furnish such services better and/or more efficiently.²¹⁶ Hence, my conclusion that section 514 and its policy of broader than normal preemption should be repealed, thus allowing the states to supplement the remedies of section 502, in particular, tort remedies against plans.

This conclusion does not assume that our current tort system is, in theory or practice, a model of jurisprudence. It merely postulates that, whatever the rules of tort liability are to be, there is no reason today for distinguishing, as the text of ERISA does, between service providers and plans.

Critics of the current tort system are tempted to embrace section 514 as an ad hoc, albeit accidental, tort reform as section 514 and its expansive preemption of state law blocks application of state tort rules in the context of employer plans. For a critic of those rules, this is not an insignificant victory. Moreover, the political pressure of those with economic interests in limiting tort liability has been decisive in resisting—so far—legislative efforts to modify the substance of ERISA preemption doctrine.

However, for the long run, the statute's distinction between plans and service providers is no longer viable intellectually or in practice. As a matter of theory, there is no reason in the era of managed care why third party service providers hired by employer plans should be subject to state tort liability while plans performing the same functions in-house are not. Moreover, this reading of the statute, while textually compelling, will, for the long run, lead plans to shift functions from contract service providers to in-house personnel to avoid the costs of tort liability—even though, in many cases, outside service providers may be more efficient than in-house personnel.

All of this suggests that, if the tort system should be modified, that modification should occur directly, not through the backdoor of ERISA preemption.

I also disagree with those who would amend, rather than repeal, section 514.²¹⁷ In general, those who would modify section

²¹⁶ Presumably, the fees charged by third party service providers will reflect their state law tort liability, liability which is eliminated by providing services in-house.

²¹⁷ See *supra* note 208 and accompanying text.

514 would carve an exemption from ERISA preemption for state tort law similar to the existing exemptions for state securities, banking, insurance, and criminal laws.

My disagreement with such amendment is that it would not go far enough. The underlying problem is not the impact of ERISA preemption in the area of tort liability, but rather the impropriety of the basic policy reflected in section 514, i.e., the greater than normal scope of ERISA preemption.

The most compelling construction of section 514 is that it creates a presumption for preemption and a zone of employer autonomy as to the substance of welfare plans. While the courts' role is to implement that statutory command, the Congress's role is to assess whether, a generation after ERISA's initial adoption, that command makes sense today. Since I answer that inquiry in the negative, I view the amendment of section 514 as a palliative; at its most basic, there is no reason for special preemption rules in the ERISA context and, hence, no reason for retaining section 514.

CONCLUSION

In several senses, ERISA is a difficult statute. Much of ERISA is technical and dense, a veritable "statutory thicket"²¹⁸ through which even experienced experts often have trouble making their way. Section 514 is difficult in a different sense, a provision which understandably tempts the reader towards a mechanistic textualism, but which, read in this fashion, leads to consequences most observers would consider unacceptable. It is by no means obvious how section 514 ought thus be understood.

Neither the *Shaw* approach, an exemplar of dictionary-based textualism, nor the *Travelers* formula are ultimately satisfactory formulations of ERISA preemption. The interpretative strategy best labeled reasoned textualism is not without its own drawbacks. It is, however, the most workable construction of section 514 and ERISA preemption. The alternative—to effectively disregard the statute—is unacceptable whether such disregard is framed as the implementation of some higher legislative intent or as a candid recognition that the text is being discarded.

Ultimately, the integrity of a system of statutory law depends upon taking statutes seriously.

²¹⁸ BORIS I. BITTKER & LAWRENCE M. STONE, *FEDERAL INCOME ESTATE AND GIFT TAXATION* vii (4th ed. 1972); see also Special Committee on Pension Simplification, New York State Bar Association, *ERISA: A Process Still Awry, A Need to Simplify*, 83 TAX NOTES 1053 (1999).